SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 128

THE TEXAS & PACIFIC RAILWAY COMPANY, PETITIONER,

vs.

S. O. POTTORFF, RECEIVER OF THE FIRST NATIONAL BANK OF EL PASO, TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Caption.

Be it remembered that at a regular term of the District Court of the United States for the Western District of Texas, in the El Paso Division thereof, the Honorable Charles A. Boynton, a United States District Judge, then and there presided and held a session of said court at the City of El Paso; that said term began on the 4th day of April, 1932, and is, on this 29th day of August, 1932, still in session, and will not terminate by operation of law until the close of the 2d day of October, 1932; that during said term and session there came on to be heard on the 25th day of May, 1932, and was determined on the 26th day of May, 1932, the following cause:

The Texas and Pacific Railway Company

vs.

S. O. Pottorff, Receiver of The First National Bank of El Paso, Texas.

No. 251 in Equity.

A transcript of the proceedings follows:

In the District Court of the United States for the Western District of Texas, El Paso Division.

THE TEXAS AND PACIFIC)
RAILWAY COMPANY,)
Plaintiff,)
vs.)No. 251 IN EQUITY.
S. O. POTTORFF, RECEIVER)
OF THE FIRST NATIONAL)
BANK OF EL PASO, TEXAS,)
Defendant.)

AMENDED BILL OF COMPLAINT.

To the Honorable Judge of Said Court:

Comes now The Texas and Pacific Railway Company, plaintiff in the above entitled and numbered cause, and by leave of the Court files this its First Amended Bill of Complaint in lieu of its Original Bill of Complaint filed herein on March 1, 1932, complaining of S. O. Pottorff, Receiver of The First National Bank of El Paso, defendant, respectfully represents:

I

1. Plaintiff, The Texas and Pacific Railway Company, is a corporation duly chartered and organized and now existing under and by virtue of the laws of the United States, to-wit: An Act of Congress entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and Acts amendatory thereof and supplemental thereto, including an Act of Congress approved May 2, 1872, whereby, among other things, the name, style and title of said Texas Pa-

cific Railroad Company was changed to "The Texas and Pacific Railway Company." Plaintiff has its principal office and place of business at Dallas in Dallas County in the Dallas Division of the Northern District of Texas.

2. Defendant, S. O. Pottorff, Receiver of The First National Bank of El Paso, is the duly appointed, qualified and acting Receiver of said bank, an insolvent national banking association, and is now residing and acting as such Receiver in El Paso County in the El Paso Division of the Western District of Texas.

II

This is a suit in equity over which the District Court of the United States for the Western District of Texas, El Paso Division, is given original jurisdiction by Section 41, paragraphs 1 and 16, Title 28, and by Section 94, Title 12, of the Code of Laws of the United States, as revised and enacted by Congress on June 28, 1926, and approved on June 30, 1926.

III

1. That heretofore, to-wit, on the 3rd day of July, 1922, while the Texas and Pacific Railway was being operated by J. L. Lancaster and Charles L. Wallace, Receivers appointed by the District Court of the United States in and for the Western District of Louisiana, Monroe Division, and upon their petition, an order was made and entered by said Court authorizing said Receivers to select The First National Bank of El Paso as an additional depository for receivership funds, which order among other things provided that said bank "shall be required to furnish bond with good and solvent sureties, * * * * in such an amount as will substantially equal the estimated average daily balances to be carried by said

Receivers in said bank." A copy of said petition and order is attached hereto, marked "Exhibit A," and made a part hereof.

2. That thereafter, on or about July 10, 1922, The First National Bank of El Paso, as principal, and National Surety Company, as surety, executed and delivered to said Receivers their certain surety bond for the sum of $25,000.00, conditioned as required by said order of said Court and payable to said Receivers, for the purpose of securing the repayment of deposits made by them in said bank upon their demand, and said Receivers thereupon opened an account with said bank and made deposits therein approximately in the amount of said surety bond.

3. That said receivership of The Texas and Pacific Railway Company was terminated on or about May 14, 1924, and, upon the written request of plaintiff, said The First National Bank of El Paso, as principal, and National Surety Company, as surety, executed and delivered to The Texas and Pacific Railway Company on or about August 7, 1924, a new surety bond in the sum of $25,000.00, payable to said railway company, guaranteeing repayment of monies deposited to its credit in said bank in the manner provided in said bond, a copy of which is attached hereto, marked "Exhibit B," and made a part hereof

4. That thereafter, during the month of April, 1927, the amount of plaintiff's deposits in said bank increased to such extent as to require additional security, and upon the written request of plaintiff said The First National Bank of El Paso, as principal, and Maryland Casualty Company, as surety, executed and delivered to The Texas and Pacific Railway Company on or about April 25, 1927, an additional surety bond in the sum of $25,-

000.00, payable to said railway company, guaranteeing repayment of monies deposited to its credit in said bank in the manner provided in said bond, a copy of which is attached hereto, marked "Exhibit C," and made a part hereof.

IV

1. During the month of January, 1931, while said The First National Bank of El Paso was solvent and a going concern, and while said surety bonds guaranteeing payment to plaintiff of plaintiff's said deposits in said bank were in full force and effect, the duly authorized officers of said bank represented to the officers of The Texas and Pacific Railway Company that said bank was required to pay heavy yearly premiums upon said surety bonds, and that said bank could effect the saving of such premiums by substituting United States Liberty bonds for said surety bonds for the securing of such deposits; that said bank could lawfully make such substitution and was so advised by its attorneys; that said bank desired to discontinue payment of such premiums on such surety bonds and in lieu thereof to pledge United States Liberty bonds of the value of $50,000.00 to secure the repayment of monies deposited by said railway company in said bank; and said The Texas and Pacific Railway Company, relying upon the representations so made by the officers of said bank that the pledge of said liberty bonds would be legal and valid and would constitute and be a binding and enforcible obligation against said bank, agreed to such substitution of said securities in lieu of said surety bonds to secure payment of said deposit, and except for said agreement on the part of defendant to substitute said liberty bonds for said surety company's guaranties plaintiff would have withdrawn its said deposit from said bank, unless such

surety bonds had been continued in full force and effect at the cost and expense of said bank.

2. That thereafter on or about January 29, 1931, the duly authorized officers of said The First National Bank of El Paso, with the full knowledge and approval of its Board of Directors, and pursuant to said substitution agreement, in good faith and in the regular course of its business, placed its certain seven (7) United States Government Fourth Liberty Loan 4¼ Coupon Bonds 1933-38, of the aggregate amount and value of $50,000.00, described by numbers and amounts, as follows:

G00129907	$ 5,000.00
A00115901	$ 5,000.00
E00040105	$ 5,000.00
K00129870	$ 5,000.00
G00353057	$10,000.00
H00353058	$10,000.00
H00298068	$10,000.00

in its Trust Department and with its Trust Officer in a separate envelope bearing the name of said railway company to be held, and were held separate and apart from all other securities of said bank, in trust for the use and benefit of said The Texas and Pacific Railway Company for the purpose of protecting it against any loss that it might sustain by reason of continuing to maintain its said deposits in said bank and for the purpose of guaranteeing the repayment of said deposits in full to said railway company upon its demand; and that there was deposited with said liberty bonds a certain pledge agreement prepared by the attorneys for said bank executed on January 29, 1931, by said The First National Bank of El Paso, acting by and through F. M. Murchison, its president, and J. E. Benton its cashier, thereunto duly authorized, with the full knowledge and

approval of the Board of Directors of said bank, a copy of which agreement is attached hereto, marked "Exhibit D," and made a part hereof. Thereupon, said surety bonds were cancelled as of January 30, 1931, and plaintiff thereafter relied upon said liberty bonds so pledged by said agreement of said The First National Bank of El Paso as security for the repayment of all monies to its credit in said bank; that said bank, its depositors, creditors and stockholders were benefitted by the substitution of said liberty bonds for said surety bonds in the amount of the premiums saved on the latter, and were benefitted in the increase of its assets by reason of said deposit, and the interest earned by said bank thereon; and the placing of said liberty bonds by said bank to secure plaintiff's said deposits was necessarily incident to the carrying on of the business of said bank, and in the receiving and retention of said deposit.

V

1. That thereafter said The Texas and Pacific Railway Company continued to have deposits in said The First National Bank of El Paso and maintained an average daily balance in said bank in excess of $50,000.00; that said bank thereafter continued to accept and pay plaintiff's drafts and checks drawn against its said deposits until on or about September 4, 1931, when said bank failed, became insolvent, closed its doors to the public and refused to accept, honor or pay any other or further checks or drafts drawn by plaintiff against said deposits; that said The Texas and Pacific Railway Company had on deposit in said bank on September 4, 1931, the sum of $54,646.94, including accrued interest, which sum of money it was entitled to receive from said bank upon demand, and that by reason thereof said The First

National Bank of El Paso, at the time of its failure, was indebted to plaintiff in said amount,

2. That thereafter, on or about September 6, 1931, the Comptroller of the Currency of the United States duly and regularly appointed S. O. Pottorff receiver of said The First National Bank of El Paso, and said receiver, on or about September 8, 1931, took charge of all the affairs, assets and securities of said bank, including plaintiff's said deposits, and said Receiver on said date also took possession of the Trust Department of said bank in which said liberty bonds were held as security for the repayment of the monies of said railway company on deposit in said bank, as aforesaid, and said Receiver has ever since said date held said bonds, and now wrongfully holds the same in his possession, and by reason thereof said Receiver became indebted and is now indebted to plaintiff in the sum of $54,646.94 plus interest thereon at the rate of six per cent per annum from September 4, 1931.

3. That thereafter, on or about November 7, 1931, said The Texas and Pacific Railway Company, acting by and through its duly authorized officers and agents, filed with said Receiver its claim against said bank as a secured creditor for the sum of $54,646.94; that said Receiver admitted the correctness of the amount of said claim but denied that it was secured by said liberty bonds and refused to recognize said agreement made by said bank as aforesaid, and to allow plaintiff's claim for the full amount thereof as he is bound to do under and by virtue of said pledge agreement, but on the contrary said Receiver wrongfully and unlawfully denies to plaintiff its right to have said liberty bonds rendered subject to said pledge agreement and wrongfully and unlawfully withholds said bonds and seeks to appropriate the value

thereof to the use and benefit of the general creditos of said bank.

VI

1. That said the First National Bank of El Paso is hopelessly insolvent and said Receiver is unable to pay the unsecured depositors of said bank more than thirty per cent of the amount of their deposits, and unless said liberty bonds or the proceeds from the sale thereof are applied to plaintiff's said claim in accordance with said agreement it will sustain irreparable loss and injury.

2. Said liberty bonds, at the time they were deposited with the Trust Department of said bank on or about January 29, 1931, as aforesaid, had a reasonable market value of $50,000.00, but that the present reasonable market value of said liberty bonds is not in excess of $45,000.00.

VII

1. That said liberty bonds are now in possession of and on deposit with said Receiver for the purpose of protecting plaintiff against any loss that it might sustain by reason of its said deposits in said bank and as a guarantee for the repayment of said deposits to plaintiff upon its demand, and there now exists and at all times since January 29, 1931, there has existed, a lien upon and against said liberty bonds in favor of plaintiff to secure the repayment of the full amount of its deposits as aforesaid.

2. That said Receiver has neither the right nor the authority to use or devote said liberty bonds or the proceeds arising from the sale thereof to any purpose other or different from that expressed in said agreement, but plaintiff is informed and believes and therefore avers

that said Receiver has intended and now intends to treat said liberty bonds or the proceeds arising from the sale thereof as general assets of said bank for the use and benefit of all its creditors.

3. That plaintiff is entitled, at its option, either to have said Receiver deliver said liberty bonds to it and to credit its said claim with the market value thereof at the time of said delivery, or to have said Receiver sell said liberty bonds at the highest obtainable price and apply the proceeds of the sale thereof to its claim against said bank.

4. That plaintiff has demanded of said Receiver that he deliver said liberty bonds to it and credit its said claim with the market value thereof at the time of said delivery but said Receiver has failed and refused and still refuses so to do; and upon such refusal, plaintiff demanded of said Receiver that he sell said liberty bonds and apply the proceeds from the sale thereof to its said claim in accordance with said agreement but said Receiver has failed and refused and still refuses so to do.

VIII

1. That said The First National Bank of El Paso was authorized and empowered as a national banking association to make said agreement and to deposit said liberty bonds for the purpose and in the manner aforesaid, and when said liberty bonds were so deposited they became, in the event of default by said bank, primarily liable for any loss plaintiff might sustain by reason of said deposits.

2. That at the time of the execution of said agreement and the deposit of said liberty bonds and at all times thereafter, said The First National Bank of El

Paso was operated under the direction and control of the Comptroller of the Currency of the United States, and said Comptroller was under the duty to promulgate such rules and regulations concerning the practice of said bank with reference to receiving and securing deposits and to disapprove any act of said bank not in accordance with the lawful powers of such bank; that said Comptroller did not at any time after said bank had pledged said bonds to secure said deposit make any complaint to said bank or in any manner object to the said pledge agreement on the part of said bank, but permitted said bank and the duly authorized examiners of said bank, after said Comptroller had obtained full knowledge of said agreement, to continue to receive deposits from plaintiff in accordance with said pledge agreement and to enjoy the benefits of such deposits, and said Receiver may not now, after the default of said bank and its failure to repay said deposits upon plaintiff's demand, repudiate or otherwise question the validity of said agreement and the pledge of said bonds without refunding to plaintiff the full amount of its said deposit in said bank at the time it ceased to do business.

IX

Plaintiff alleges and shows to the court that if it should be held that the pledge agreement hereinbefore alleged is uninforcible, then plaintiff alleges that it is entitled to have said Receiver return to it the full amount of its money on deposit in such bank on September 4, 1931 with lawful interest thereon from said date as for money had and received by said bank, which in equity and good conscience, under the facts and circumstances, it is bound to return to plaintiff.

WHEREFORE, and for as much as plaintiff has not

an adequate remedy at law, and is entitled to relief under the principles administered in Courts of Equity where matters of this nature are properly cognizable, plaintiff prays:

1. That writ of subpoena issue out of and under the seal of this court, directed to the defendant, S. O. Pottorff, Receiver of The First National Bank of El Paso, requiring him to appear on a day set before this court and then and there full, true and correct answers make to all and singular the allegations herein, but not under oath, answer under oath being expressly waived, and to perform and abide by such orders, directions and decrees as may be entered herein; and

2. That upon hearing hereof the Court by its decree adjudge that The Texas and Pacific Railway Company is a secured creditor of The First National Bank of El Paso to the amount or value of said liberty bonds; that said bonds are held by said Receiver in trust for the use and benefit of plaintiff for the purpose of protecting it against any loss that it might sustain by reason of its said deposits in said bank and as a guarantee for the repayment of said deposits upon its demand; that an equitable lien exists upon and against said bonds for said purposes in favor of The Texas and Pacific Railway Company; and

3. That the Court by its decree direct and order defendant, S. O. Pottorff, Receiver of The First National Bank of El Paso, to forthwith deliver said liberty bonds to The Texas and Pacific Railway Company and to credit its said claim with a sum equal to the current market price of said bonds in El Paso on the date of said delivery; and

4. That the Court by its decree further adjudge that

said liberty bonds when so delivered to plaintiff by said Receiver shall become the sole and separate property of The Texas and Pacific Railway Company; and

5. In the alternative and in the event the Court should hold that complainant is not entitled to the possession of said bonds and does not have the right to sell or otherwise dispose of the same, complainant prays that the Court by its decree direct and order said Receiver to sell said liberty bonds forthwith at the highest obtainable price, to deliver the proceeds thereof to The Texas and Pacific Railway Company, and to credit its said claim of $54,646.94, with lawful interest thereon from September 4, 1931, with said sum of money; and

6. That the court by its decree further adjudge that the relief prayed for and granted herein is without prejudice to the right of complainant to recover of and from said Receiver any other or further sum or sums of money owing to it by said Receiver after said bonds or the proceeds from the sale thereof are charged against its said claim;

7. Or, in the alternative, if the court should hold that plaintiff cannot recover as prayed for upon its pledge agreement, then in such event plaintiff prays that it be ordered and decreed by the court that defendant return to plaintiff the full amount of its deposit, to-wit, the sum of $54,646.94, with interest thereon as aforesaid, as for money had and received;

8. That complainant have such other and further relief in the premises, including all costs of court, as the nature and circumstances of this suit may require, and as the court may deem just and proper.

Respectfully submitted,

S. N. RUSSELL,
D. W. HARRINGTON,
M. E. CLINTON,
T. D. GRESHAM,
Attorneys for Plaintiff, The Texas and Pacific Railway Company.

In the District Court of the United States in and for the Western District of Louisiana, Monroe Division.

B. F. BUSH, Receiver of the railroads, etc., of St. Louis, Iron Mountain & Southern Railway Company, *Complaniant,*	)
against	) No. 1120 In Equity.
THE TEXAS AND PACIFIC RAILWAY COMPANY, *Defendant.*	)

To the Honarable, Rufus E. Foster, Judge of said Court:

The petition of J. L. Lancaster and Charles L. Wallace, Receivers herein, would respectfully represent that by an order made herein on the 4th day of November, 1916, certain banks located at various points along the line of road in charge of your Receivers were designated as depositories of the funds of the Receivers.

Your petitioners would state that El Paso, Texas, is at the extreme Western Termini of the line of road in their charge, and that the State National Bank of El Paso was designated depository by the order of Novemvember 4, 1916.

Your petitoners would respectfully state that, in their opinion, an additional depository should be had at El Paso, and that it is to the interest of your Receivers to have the Court designate the First National Bank of El

Paso as a bank in which your Receivers are authorized to deposit their funds.

The said First National Bank of El Paso, is the largest bank in El Paso, is solvent in every way, and is in a condition to be of service to your Receivers in many ways.

That said bank will comply with the order of Court applying to other depositories and will give bond to protect your Receivers against any loss.

J. L. LANCASTER and CHARLES L. WALLACE
Receivers of
THE TEXAS AND PACIFIC RAILWAY COMPANY.

(Signed) By THOMAS J. FREEMAN
General Counsel for Receivers.

EXHIBIT A.

ORDER

Upon the filing and reading of the foregoing petition, and upon consideration thereof, it is ordered that the Receivers herein are authorized to select as an additional depository of the funds of the Receivers, the First National Bank of El Paso, Texas.

That said First National Bank of El Paso, Texas, shall be required to furnish bond with good and solvent sureties, (either corporation or individual) in such an amount as will substantially equal the estimated average daily balances to be carried by said Receivers in said bank.

Thus done and signed, this the 3rd day of July 1922.

(Signed) RUFUS E. FOSTER
United States District Judge.

Filed July 6, 1922,
W. B. Lee, Clerk,
U. S. Dist. Court,
West. Dist. of Louisiana.

EXHIBIT A.

THE STATE OF TEXAS)
COUNTY OF EL PASO.)

KNOW ALL MEN BY THESE PRESENTS, That We, The First National Bank of El Paso, Texas, as principals, and The National Surety Company of New York, as surety, acknowledge to owe and be indebted jointly, severally and in solido to The Texas and Pacific Railway Company, in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) for the payment of which well and truly to be made, we hereby bind ourselves, our successors, assigns and legal representatives jointly, severally and in solido.

IN WITNESS WHEREOF we have hereunto set our hands at El Paso, Texas, this 7th day of August, A. D. 1924.

But the above obligation is subject to the following condition: That if the said The First National Bank of El Paso, Texas, shall well and truly, on demand, pay over and deliver to The Texas and Pacific Railway Company, or its order, all and such sums of money, funds and valuables, general and special, as may now be on deposit by, in favor of, or in the name of The Texas and Pacific Railway Company with the said The First National Bank of El Paso, Texas, and as may be deposited hereafter by The Texas and Pacific Railway Company or by any one for its account, with the said The First National Bank of El Paso, Texas, or that may come into the custody or control of said The First National Bank

of El Paso, Texas, for account of The Texas and Pacific Railway Company, then and in that event the above obligation shall become null and void; otherwise to remain in full force and effect.

In event it becomes necessary to enforce the obligation of this bond by suit, all costs of same, including attorney's fees, are to be paid by the principals and surety herein.

FIRST NATIONAL BANK OF EL PASO, TEXAS
By JAMES G. McNARY
President

ATTEST:
(Signed) J. E. BENTON
Cashier.
(SEAL)

NATIONAL SURETY COMPANY, Surety.
By A. M. CLARK
Vice President, Surety

ATTEST:
A. C. MILLIKAN,
Asst. Secretary.
(SEAL)

EXHIBIT B.

MARYLAND CASUALTY COMPANY
BALTIMORE

DEPOSITORY BOND

STATE OF TEXAS)
COUNTY OF EL PASO)

NOW ALL MEN BY THESE PRESENTS:

That we, The First National Bank of El Paso, Texas,

as principals, and MARYLAND CASUALTY COMPANY of Baltimore, Maryland, as surety, acknowledge to owe and be indebted jointly, severally and in solido to The Texas and Pacific Railway Company, in the sum of TWENTY FIVE THOUSAND DOLLARS ($25,000.00), for the payment of which well and truly to be made, we hereby bind ourselves, our successors, assigns and legal representatives jointly, severally and in solido.

IN WITNESS WHEREOF we have hereunto set our hands at El Paso, Texas, this 25th day of April, A. D. 1927.

But the above obligation is subject to the following condition: That if the said The First National Bank of El Paso, Texas, shall well and truly, on demand, pay over and deliver to The Texas and Pacific Railway Company, or its order, all and such sums of money, funds and valuables, general and special, as may now be on deposit by, in favor of, or in the name of The Texas and Pacific Railway Company with the said The First National Bank of El Paso, Texas, and as may be deposited hereafter by The Texas and Pacific Railway Company or by any one for its account, with the said The First National Bank of El Paso, Texas, or that may come into the custody or control of said The First National Bank of El Paso, Texas, for account of The Texas and Pacific Railway Company, then and in that event the above obligation shall become null and void; otherwise to remain in full force and effect.

In event it becomes necessary to enforce the obligation of this bond by suit, all costs of same, including attorney's fees, are to be paid by the principals and surety herein.

The Surety shall have the right to terminate its suretyship under this obligation by serving notice, in writing, of its election so to do, upon said The Texas and Pa-

cific Railway Company, or its lawful representatives, and thereupon the said Surety shall be discharged from any and all liability hereunder for any default of the Principal occurring after the expiration of thirty (30) days after the service of such notice.

WITNESS OUR HANDS AND SEALS.

FIRST NATIONAL BANK OF EL PASO
By F. M. MURCHISON
Vice President

ATTEST:
J. E. BENTON
Cashier.
(SEAL)

MARYLAND CASUALTY COMPANY
Surety
By HERMAN A. TAYLOR
Attorney-in-Fact.

(SEAL)

EXHIBIT C.

STATE OF TEXAS)
COUNTY OF EL PASO.)

THIS INSTRUMENT WITNESSETH:

The Texas and Pacific Railway Company, a corporation, carries an open checking account with the undersigned, The First National Bank of El Paso, in El Paso, Texas, and desires to continue so to do, and the Bank desires to continue to hold the said deposit.

For the purpose of securing the said Texas & Pacific Railway Company against any loss that might possibly occur by reason of its continuance and maintenance of the said deposit, The First National Bank of El Paso

has on this date deposited in its Trust Department, and with its Trust Officer which fact is evidenced by the signed statement to that effect of the said Trust Officer hereto attached, United States Government Liberty Bonds of the par value of Fifty Thousand ($50,000.00) Dollars, to be held by the said Trust Department, through its Trust Officer, in trust for the use and benefit of the said Texas & Pacific Railway Company. This is for the purpose of protecting it against loss as aforesaid, and it is agreed that the said Bonds shall, at all times, remain in the Trust Department as such security. Provided, however, that should the Bank at any time desire to withdraw the Liberty Bonds herewith deposited, and substitute therefor other bonds of the United States of America, or Treasury Receipts of the Treasury Department of the United States of America of equal par value, it shall have the right so to do.

Upon the closing of the said account, and only then, shall the said The First National Bank of El Paso have the right to withdraw the said securities from its Trust Department.

IN WITNESS WHEREOF, the said The First National Bank of El Paso has caused this instrument to be executed in duplicate by its President, attested by its Cashier or Assistant Cashier, and its corporate seal hereunto affixed, at El Paso, Texas, this 29th day of January, 1931, one copy being delivered to The Texas and Pacific Railway Company and one copy deposited with the Bonds with the Trust Department.

THE FIRST NATIONAL BANK OF EL PASO
(Signed) F. M. MURCHISON
President.

ATTEST:
(Signed) J. E. BENTON, Cashier,
(Seal of The First National Bank of El Paso)

STATE OF TEXAS)
COUNTY OF EL PASO.)

I, H. W. Moore, Trust Officer of The First National Bank of El Paso, hereby acknowledge receipt of the Trust Department of the said Bank of the Bonds above named and upon the conditions therein set forth.

(Signed) H. W. MOORE,
Trust Officer,
The First National Bank of El Paso.

EXHIBIT D.

Filed May 25, 1932. D. H. Hart, Clerk, By J. N. Phillips, Deputy Clerk.

Motion to Dismiss Amended Bill of Complaint.

To the Honorable Charles A. Boynton, Judge of the United States District Court for the Western District of Texas:

Now comes S. O. Pottorff, Receiver of The First National Bank of El Paso, Texas, Respondent in the above cause, and moves the Court to dismiss the Amended Bill of Complaint filed in this cause because said Bill does not state any matter of equity entitling Complainant to the relief prayed for, nor are the facts, as stated, sufficient to entitle Complainant to any relief against this Respondent.

WHEREFORE, this Respondent prays the Judgment of this Court whether he shall further answer, and that he be dismissed with his costs.

A. H. GOLDSTEIN
JONES, GOLDSTEIN, HARDIE & GRAMBLING

T. HARDIE

Solicitors for the Respondent.

Filed May 25, 1932. D. H. Hart, Clerk, By J. N. Phillips, Deputy Clerk.

Cross Bill of S. O. Pottorff, Receiver.

To the Honorable Charles A. Boynton, Judge of the United States District Court for the Western District of Texas:

Comes now S. O. Pottorff, Receiver of the First National Bank of El Paso, Texas, hereinafter styled Cross Complainant, and by leave of the Court, files this, his original Cross Bill, complaining of The Texas and Pacific Railway Company, hereinafter styled Cross Respondent, and so represents to the Court:

I.

Cross Complainant is the duly appointed, duly qualified and acting receiver of The First National Bank of El Paso, Texas, an insolvent national banking association, duly incorporated under the laws of these United States of America, and the said S. O. Pottorff, in his official capacity, is now residing in and is acting as Receiver in El Paso County, in the El Paso Division of the Western District of Texas, where said banking corporation had its office and place of business.

II.

The Cross Respondent is a corporation duly incorporated under and by virtue of the laws of the United States, to-wit, under and by virtue of an act of Congress, entitled "An Act to Incorporate The Texas Pacific Railroad Company and to Aid in the Construction of its Road

and for Other Purposes," approved March 3, 1871, and Acts amendatory thereof and supplementary thereto, including an Act of Congress approved May 2, 1872, whereby, among other things, the name and style and title of said Texas Pacific Railroad Company was changed to "The Texas and Pacific Railway Company," and Cross Respondent has its principal office and place of business in Dallas County, in the State of Texas.

III.

On or about the 29th of January, 1931, Cross Respondent demanded of The First National Bank of El Paso, Texas, that it give security to guarantee the payment by said Bank to the Cross Respondent of any deposits that might be made by the Cross Respondent in said Bank, and, in order to comply with said demand, The First National Bank of El Paso, Texas, executed and delivered to the Cross Respondent a certain instrument in writing, having the terms and provisions as set forth in Exhibit "A," hereto attached, and in connection with said Agreement, said Bank pledged its certain seven (7) United States government Fourth Liberty Loan 4¼% coupon bonds, 1933-1938, of the aggregate amount and value of $50,000.00, described by numbers and amounts as follows:

G00129907	$ 5,000.00
A00115901	5,000.00
E00040105	5,000.00
K00129870	5,000.00
G00353057	10,000.00
H00353058	10,000.00
H00298068	10,000.00

all of them constituting and being assets of The First National Bank of El Paso, Texas, and in which the general

funds of said Bank had been invested, and deposited same in its Trust Department, and with its Trust Officer, to be held separate and apart from the other securities of said Bank, under and in accordance with the terms and provisions of the Contract mentioned and referred to and described in "Exhibit A," and all of said Bonds remained so in the possession of The First National Bank of El Paso, Texas, up to the time that Cross Complainant qualified as Receiver of The First National Bank of El Paso, Texas.

IV.

At the time the Agreement referred to as Exhibit "A" was executed, and at the time the Liberty Bonds were placd in the Trust Department as above alleged, Cross Respondent had certain funds on deposit with The First National Bank of El Paso, Texas, and The First National Bank of El Paso, Texas, was indebted to Cross Respondent for funds so deposited; and, thereafter, from time to time, the Cross Respondent deposited additional sums and made withdrawals of funds from time to time from said Bank. The Cross Respondent, on September 4, 1931, the date upon which said Bank became insolvent and closed its doors, and also on September 6, 1931, the date upon which the Comptroller of the Currency of the United States duly and regularly appointed S. O. Pottorff Receiver of The First National Bank, and also on September 8, 1931, the date upon which said Receiver qualified and took charge of all of the assets and securities and affairs of said Bank, had on deposit with said Bank and standing to its credit on the books of said Bank, the sum of $54,336.74, payable to the Cross Respondent on demand, and said amount included accrued interest on the deposit balances theretofore maintained by the Cross Respondent in said Bank, and in addition to such

liability, The First National Bank of El Paso, Texas, and S. O. Pottorff, Receiver of said Bank, were, on the dates above mentioned, indebted to Cross Respondent in an additional sum of $310.20, as evidenced by a Cashier's Check which had theretofore been issued by The First National Bank of El Paso, Texas, to Cross Respondent, and which was payable to Cross Respondent and held by Cross Respondent, and which, although duly presented to said Bank, has never been paid.

V.

The assets which Cross Complainant received as Receiver of The First National Bank of El Paso, Texas, are not sufficient to pay the general creditors of said Bank the full amount of their claims, and Cross Respondent is asserting a lien upon the Liberty Bonds hereinabove set forth.

VI.

The officers of The First National Bank of El Paso, Texas, had no right or authority to make any such agreement as they attempted to make, and the terms of which are set forth in Exhibit "A," and said Bank was without authority to make said Agreement. Any such Agreement was and is ultra vires, contrary to public policy, contrary to the Statutes of the United States, and is absolutely void and of no force and effect, and the enforcement of any such Agreement would be in fraud of the rights of the general unsecured depositors of The First National Bank of El Paso, Texas, whose rights are represented by Cross Complainant, by the claims which are being asserted by the Cross Respondent casting a cloud upon the title of Cross Complainant to said Liberty Bonds and interfering with the sale of said bonds by Cross Complainant, and it is necessary that said bonds

be sold and disposed of by him in order that he may properly administer and pay out the assets of The First National Bank of El Paso, Texas, to those persons entitled to receive the proceeds of said assets, including the general depositors of said Bank. The reasonable market value of the Liberty Bonds above referred to has declined since Cross Complainant was appointed and qualified as Receiver of said Bank, and the market value of such Bonds will probably continue to decline.

WHEREFORE, PREMISES CONSIDERED, Cross Complainant prays the Court to enter an Order adjudging and decreeing that the Contract, a copy of which is hereto attached and market Exhibit "A," was and is void and of no force and effect, and that the Liberty Bonds hereinabove described are part of the general assets of The First National Bank of El Paso, Texas, which passed to and became the property of Cross Complainant, and constitute assets to be administered by him for the benefit of the general creditors and depositors of The First National Bank of El Paso, Texas, and your Cross Complainant prays for an Order decreeing that the Cross Respondent has no right, title, interest or claim in said Liberty Bonds, and your Cross Complainant prays for an Order enjoining and restraining the Cross Respondent from asserting any further rights or claims in said Liberty Bonds, and your Cross Respondent prays for such other and further relief as in equity he may be entitled to have and receive under the allegations of this Cross Bill.

A. H. GOLDSTEIN
JONES, GOLDSTEIN, HARDIE & GRAMBLING
T. HARDIE
Solicitors for Cross Complainant.

EXHIBIT "A."

STATE OF TEXAS,)
COUNTY OF EL PASO.)

THIS INSTRUMENT WITNESSETH:

The Texas & Pacific Railway Company, a corporation, carries an open checking account with the undersigned, The First National Bank of El Paso, in El Paso, Texas, and desires to continue so to do, and the Bank desires to continue to hold the said deposit.

For the purpose of securing the said Texas & Pacific Railway Company against any loss that might possibly occur by reason of its continuance and maintenance of the said deposit, The First National Bank of El Paso has on this date deposited in its Trust Department, and with its Trust Officer, which fact is evidence by signed statement to that effect of the said Trust Officer hereto attached, United States Government Liberty Bonds of the par value of Fifty Thousand ($50,000.00) Dollars, to be held by the said Trust Department, through its Trust Officer, in trust for the use and benefit of the said Texas & Pacific Railway Company. This is for the purpose of protecting it against loss as aforesaid, and it is agreed that the said Bonds shall, at all times, remain in the Trust Department as such security. Provided, however, that should the Bank at any time desire to withdraw the Liberty Bonds herewith deposited, and substitute therefor other bonds of the United States of America, or Treasury Receipts of the Treasury Department of the United States of America of equal par value, it shall have the right so to do.

Upon the closing of said account, and only then, shall the said The First National Bank of El Paso have the right to withdraw the said securities from its Trust Department.

IN WITNESS WHEREOF, the said The First National Bank of El Paso has caused this instrument to be executed in duplicate by its president attested by its Cashier or Assistant Cashier, and its corporate seal hereunto affixed, at El Paso, Texas, this 29th day of January, 1931, one copy being delivered to the Texas & Pacific Railway Company and one copy deposited with the Bonds with the Trust Department.

THE FIRST NATIONAL BANK OF EL PASO,
(Signed) F. M. MURCHISON,
President.

ATTEST:
(Signed) J. E. BENTON, Cashier,
(Seal of The First National Bank of El Paso)

STATE OF TEXAS,)
COUNTY OF EL PASO.)

I, H. W. Moore, Trust Officer of The First National Bank of El Paso, hereby acknowledge receipt to the Trust Department of the said Bank of the Bonds above named and upon the conditions therein set forth.

(Signed) H. W. MOORE,
Trust Officer,
The First National Bank of El Paso.

Filed April 5, 1932. D. H. Hart, Clerk.

Answer of Defendant to Amended Bill of Complaint.

To the Said Honorable Court:

Comes now S. O. Pottorff, Receiver of The First National Bank of El Paso, Texas, hereinafter styled Defendant, and subject to his Motion to Dismiss the Amend-

ed Bill of Complaint, and answering only in the event that said Motion be overruled, says in reply to the First Count of the Amended Bill of Complaint:

I.

This Defendant admits the allegations contained in Paragraphs I, II and III.

II.

Defendant does not have sufficient information to, upon his own knowledge, affirm or deny the allegations of sub-section 1 of Paragraph IV and therefore denies said allegations.

III.

Defendant admits the allegations contained in sub-section 2 of Paragraph IV with the exception that this Defendant denies that the pledging of the Liberty Bonds referred to and the making of the pledge agreement referred to was done in good faith and in the regular course of business of The First National Bank, and this Defendant denies that the officers of said Bank were authorized to make any such agreement, and denies that the Bank was authorized to make any such agreement, and denies that Plaintiff was entitled to rely on any such pledge, or any such agreement, with reference to such Liberty bonds, and further denies that the depositors of said Bank were benefitted by any of said agreements, and denies that the deposits and assets of the Bank were increased by reason of any such deposit of Liberty Bonds or by said agreement, and denies that the pledging of said bonds was necessary for said Bank to properly carry on its business, and this Defendant says that said pledge agreement was and is wholly unauthorized and void and of no effect, and all of the parties concerned

with said pledge were charged with knowledge of the invalidity of said pledge agreement.

IV.

1. Defendant admits the allegations contained in sub-section 1 of paragraph V, with the exception that this Defendant denies that the Plaintiff had on deposit in said Bank on September 4, 1931, any specific sums of money, and says that the First National Bank was, on said date merely indebted to the Plaintiff in the amount of $54,646.94, and said Railway Company was, as to said indebtedness, merely a general creditor of said Bank.

2. Defendant admits the allegations contained in sub-section 2 of Paragraph V with the exception that this Defendant denies that he ever received any sums of money belonging to Plaintiff, and denies that he wrongfully holds possession of the Liberty Bonds referred to, and he denies that said bonds were subject to any lien in favor of Plaintiff, and denies that Plaintiff has any rights in said bonds.

3. Defendant admits the allegations of sub-section 3 of Paragraph V.

V.

1. Defendant admits the allegations of sub-section 1 of Paragraph VI with the exception that Defendant denies the allegation that this Estate will be unable to pay to unsecured depositors more than 30% of the amount of their deposits. This Defendant does not have sufficient information to, at this time, allege upon his own knowledge the amount of the total dividends which will be paid to unsecured depositors.

2. Defendant denies the allegations contained in sub-section 2 of Paragraph VI.

VI.

1. Defendant denies the allegations of sub-section 1 of Paragraph VII.

2. Defendant denies the allegations contained in sub-section 2 of Paragraph VII with the exception that this Defendant admits that he intends to treat the Liberty bonds and the proceeds arising from the sale thereof as general assets of his trust for the use and benefit of all of the creditors of The First National Bank.

3. Defendant denies the allegations of sub-section 3 of Paragraph VII.

4. Defendant admits the allegations of sub-section 4 of Paragraph 7.

VII.

Defendant denies the allegations of sub-sections 1 and 2 of Paragraph VIII.

VIII.

Defendant denies the allegations contained in Paragraph IX.

WHEREFORE, the Plaintiff is not entitled to have or receive any relief at the hands of this Court, and this Defendant prays that Plaintiff take nothing and that as to the original suit brought by the Plaintiff this Defendant go hence without day and recover of and from the Plaintiff all costs in this behalf incurred.

ABE H. GOLDSTEIN
JONES, GOLDSTEIN, HARDIE & GRAMBLNG
THORNTON HARDIE
Solicitors for Defendant.

Filed May 25, 1932 (El Paso Division) D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas. By Flora L. Linker, Deputy Clerk.

Motion of The Texas and Pacific Railway Company, Cross-Respondent, to Dismiss Cross-Bill of S. O. Pottorff, Receiver, Cross-Complainant.

To the Honorable Charles A. Boynton, Judge of the United States District Court for the Western District of Texas:

Comes now the Texas and Pacific Railway Company, named as Cross-Respondent in Cross-Bill of S. C. Pottorff, Receiver of The First National Bank of El Paso, Cross-Complainant, filed herein on April 5, 1932, and moves the court to dismiss said Cross-Bill, because the same does not state any matters in equity entitling Cross-Complainant to have the liberty bonds insolved in this suit declared general assets of The First National Bank of El Paso, subject to administration by Cross-Complainant for the benefit of the general creditors and depositors of said bank, nor does said Cross-Bill state any matter in equity which entitles Cross-Complainant to the relief prayed for, nor are the facts, as stated, sufficient to entitled Cross-Complainant to any relief against this Cross-Respondent.

WHEREFORE, it prays the judgment of the court whether it shall further answer said Cross-Bill, and that it be dismissed with its costs.

S. N. RUSSELL,
M. E. CLINTON,

Attorneys for The Texas and Pacific Railway Company, Cross-Respondent.

Filed May 18, 1932, D. H. Hart, Clerk, By Flora L. Linker, Deputy.

Court's Oral Finding.

REMARKS AND RULING OF THE COURT AT CONCLUSION OF ARGUMENT IN ABOVE CASE FOLLOWIG TRIAL THEREOF.

THE COURT: Gentlemen, the Court finds much in the reasoning of Judge Dickinson in the dissenting opinion in the B. & O. case that appeals to this Court, as well as the decision of the majority of the Court.

The Court has read a case that probably counsel on both sides have also read, decision of the Supreme Court of the United States in the case of First National Bank vs. Missouri, reported in 263 U. S., which case is referred to and relied upon by the Court in the majority opinion in the case of Baltimore & Ohio Railway Company vs. Smith, in suport of the announcement of the Court in that decision, in which the Court there said: "It is admitted that whenever the Comptroller was asked for an opinion as to the power of national banks to pledge collateral to secure private deposits, in every instance, he has disapproved of such pledges and held that, in his opinion, national banks do not have that power. Such uniform and long-continued interpretation and practice of an act by the department charged with administering it has great weight and is persuasive as to its correct construction." Which has been cited by the defendant, and relied upon by defendant's counsel in this case. The Court cites several cases, among them, in support of that proposition, First National Bank in St. Louis vs. State of Missouri, in 263 U. S. 640, opinion rendered by Associate Justice Sutherland. This is a suit which was brought by the Attorney General of the State of Missou-

ri, seeking to have it declared unlawful for the First National Bank in St. Louis to establish a branch bank, and the Court felt as an incident in determination of that matter it was necessary for the Court to pass upon that which was being sought by the State of Missouri, applied to a national bank, and laws of the United States, and the Court said in their opinion it does not. "The extent of the powers of national banks is to be measured by the terms of the federal statutes relating to such associations, and they can rightfully exercise only such as are expressly granted or such incidental powers as are necessary to carry on the business for which they are established," and a number of cases are there cited.

Then again the Court says: "But it is said that"—quoting again from that opinion—"the establishment of a branch bank is the exercise of an incidental power conferred by Sec. 5136, Rev. Stats., by which national banking associations are vested with 'all such incidental powers as shall be necessary to carry on the business of banking.'"

And the Court went on in that decision further and holds that the establishment of a branch in another building on the same block, or adjacent thereto, which the management of that bank thought would add to their business, was not an incident to the transaction of that business; and the Supreme Court holds in that decision that was not an incident to such business, it was not a necessary incident to the conducting of the banking business.

The Court refers in that opinion to the fact that under the charter the bank shall have one place and office, place for the transaction of their business, and this called for another. But the Court was much impressed by that language used there, that "The extent of the powers of national banks is to be measured by the terms of the

federal statutes relating to such associations, and they can rightfully exercise only such as are expressly granted or such incidental powers as are necessary to carry on the business for which they are established."

Now, the Circuit Court of Appeals, in the majority opinion in the B. & O. case, holds that it is not necessary to the carrying on of their banking business to pledge their assets to secure private deposits.

When it comes to a question of multiplying or subtracting, as counsel might have suggested a moment ago, decisions on questions as to whether or not national banking associations possessed powers as an incident to the transaction of the banking business to pledge its assets, bonds, to secure private deposits, there may have been decisions, and are decisions, cited, gathered together and cited in this opinion of Judge Parker for the Fourth Circuit, in the case of Schumacher vs. Eastern Bank & Trust Company, reported in 52 F. (2d) commencing at page 925, and shown on page 927 of that opinion. Now, the Court does not find it is a matter of addition and subtraction as to the decisions holding that national banking associations under the Federal Statutes of the United States are not authorized to pledge assets and bonds to secure a private deposit. There is a clear-cut, complete absolute decision in the B. & O. case,—Baltimore & Ohio Railway Company vs. Smith, reported in 56 F. (2) 799, by the majority opinion of the Court in that case, wherein it is held directly and clearly that national banking associations do not possess under the statute, and not vested with authority to pledge bonds and assets to secure private deposits. And it is there held in that opinion, with which counsel on both sides in this case are entirely familiar, that "Power is thus given to conduct a banking business and all incidental power necessary to carry it on." And cites a number of cases. "Implicit power must be

found, if at all, in the words, 'all such incidental powers as shall be necessary to carry on the business of banking.' " The Court says: "There is no evidence showing that it is necessary. On the other hand, inference is fairly reasonable that thousands of successful banks have never exercised such power. It cannot be concluded from the evidence that the exercise of such power is necessary in order to carry on the business of banking successfully."

The Court further says: "A national bank has only the power expressly given it and such incidental powers as are necessary to carry on the business of the powers expressly given. In none of these acts is any mention whatever made of the power to pledge assets to secure private deposits. If Congress had intended to give such power to national banks, it would have expressly indicated such intention. The fact that it did authorize national banks to pledge their property to secure public deposits, but was silent as to private deposits, clearly indicates that it did not intend to give that power in the case of private deposits."

And, further, "The reports of the Senate and House committees, on the amendment of 1930 to the Banking Act, show that Congress intended to deny that power to national banks in the case of private deposits."

Then the Court continues further and states: "The pledging of the assets of a national bank to secure a private deposit is not fairly incidental or necessary to carry on the business of banking. Such a contract is not only voidable but wholly void and of no legal effect."

In that case it is contended by the appellants therein, as in this case by the plaintiff, that if the bank did not have the power to pledge its assets to secure private deposits in question the Receiver cannot compel the return of the security without paying the deposit balance. The

Court goes on further there and holds a Receiver has power to renounce a contract, being void and illegal.

That is the opinion of a majority of the Court, of the Circuit Court of Appeals, in a case that the Court thinks exactly similar to the case now before the Court here. There is a dissenting opinion in that case. The authorities are reviewed at length by the majority opinion in that case.

Now, the Court does not find that the opinion of the Circuit Court of Appeals for the Fourth Circuit in the case of Schumacher vs. Eastern Bank & Trust Co., reported in 52 F. (2d) 925, or by that Court, the same Circuit Court of Appeals, in the case of Burrowes vs. Nimocks, 35 F. (2d) 152, 155, in any manner conflicting with the direct, clear, decisive and definite holding of the Circuit Court of Appeals in the Third Circuit in the Baltimore & Ohio case. The two cases decided by the Circuit Court of Appeals for the Fourth Circuit rest upon different facts, and decided upon a different ground. The decision in each of said cases rendered by the Circuit Court of Appeals for the Third Circuit rests upon the ground that the Court finds that the matters there involved, transactions entered into, related to loans made of funds to the bank; the bank was in need of loans, and made the loans in proper and regular way, and put up collateral; and the Court held that the bank should turn over the collateral. There is an expression used, certainly obiter dicta, by Judge Parker in the Schumacher vs. Eastern Bank & Trust Co. case, that: "Although some of the cases draw a distinction between a pledge of assets to secure a deposit of public funds and a pledge to secure a private deposit, there would seem to be, in the absence of statute, no valid basis for such distinction." Now, that expression by that learned Judge in that decision, of thought or line of reasoning that he might exercise, per-

haps was not called upon to exercise it in deciding this case, expressly says so when he said: "But, without deciding what would be the rule in the case of an ordinary private deposit, we are satisfied that deposits by a bank, such as those involved here, made as loans to and for the accommodation of the bank in which they are made, do not come within that category." And therefore, under the general rule of law, any expression made by a Court in its opinion not necessary to the decision reached by the Court in the particular case decided, would be held as obiter dicta, clearly obiter dicta in the Baltimore & Ohio case against Smith. Therefore, we have a decision, rendered by the majority of the Court, of a Circuit Court of Appeals of the United States for the Third Circuit, not this Circuit, which is the Fifth Circuit, which is clear and decisive of issues and matters similar to those involved in the case here at bar; and under well recognized rules of procedure and practice, that which should govern and control a trial Federal Judge if there is no decision of the Supreme Court on the particular points involved, or by the Circuit Court of Appeals for the Circuit in which the trial Court is situated, but there is an opinion by a Circuit Court of Appeals of another Circuit, that the trial Court of another Circuit should follow that decision of the Circuit Court of Appeals rendered in another Circuit. The Court here finds that controlling and binding on this Court, and the Court in this case will therefore render judgment and decree that the plaintiff take nothing by reason of their suit and action in this case; and the Court will decree, for whatever it is worth, if you want to avail yourselves of it, that you are entitled to recovery only as a general claim, and plaintiff is not entitled to recover the bonds put up on deposit, or any lien against said bonds, and the contract relating to the same is declared by the Court to be invalid and void;

that plaintiff would not be entitled to any recovery herein other than as a general creditor as against the Receiver. And the Court will render decree in favor of the Receiver on the cross action, for the quieting of title and rights of the Receiver in and to the particular bonds described and alleged to have been pledged in this matter.

The Court will overrule the motion,—probably should have done that in the first instance,—will overrule the motion to dismiss interposed by the defendant to the action of the plaintiff herein, as the Court now renders, is rendering decree, having heard the matter upon the merits and testimony, rendering decree in favor of the defendant. And also overrules the motion to strike of the Complainant on the cross action of the defendant.

As the Court has announced before, that under Rule 70½, in all equity cases, it is required that the Court make findings of fact and conclusions of law. The Court will ask counsel for the defendant to prepare findings of fact and conclusions of law and submit the same to the Court, and they may submit a copy to counsel on the other side; and also draft of decree, and if counsel for the Complainant desire to make any request of the Court for specific findings of fact or conclusions of law that may be done, and the Court will reconcile the same as the final findings.

The State of Texas,
County of El Paso.

I, Roy Lassetter, Shorthand Reporter, hereby certify that the foregoing is a true and correct copy of the remarks and ruling of the Court, at conclusion of argument and trial of the case of Texas and Pacific Railway Company vs. S. O. Pottorff, Receiver, First National

Bank of El Paso, No. 251 Equity, United States District Court in and for the Western District of Texas, El Paso Division thereof; said remarks and ruling being made by the Court on Thursday, May 26, 1932.

Witness my hand at El Paso, Texas, this 22nd day of August, A. D. 1932.

ROY LASSETTER
Shorthand Reporter.

Filed Aug. 22 1932. (El Paso Division) D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, By J. N. Phillips, Deputy Clerk.

Finding of Facts.

(See page 88).

Conclusions of Law.

(See page 95).

Plaintiff's Objections and Exceptions to Conclusions of Law.

(See page 97).

Order Overruling Plaintiff's Objections and Exceptions to Conclusions of Law.

(See page 101).

Judgment.

BE IT REMEMBERED that on the 25th day of May, 1932, the above styled and numbered cause came on to be regularly heard; and thereupon, Defendant presented his Motion to Dismiss the Amended Bill of Complaint, and the Court announced that he would reserve his decision on said Motion until the conclusion of the case, to which all parties assented; and thereupon, the Plain-

tiff presented its Motion to Dismiss the Cross-Complaint of the Defendant, and the Court announced that he would reserve his decision on said Motion until the conclusion of the case, to which both parties assented; and thereupon, the pleadings were read, and the evidence introduced and the proceedings in the case continued until the 26th day of May, 1932, when all parties announced that they had completed the introduction of testimony; and thereupon, the Court, upon consideration of the pleadings and the evidence, and upon hearing argument from counsel for both parties, overruled the Motion of the Defendant, S. O. Pottorff, Receiver of the First National Bank of El Paso, Texas, to dismiss the Amended Bill of Complaint, and also overruled the Motion of the Plaintiff, The Texas and Pacific Railway Company, to dismiss the Cross Complaint theretofore filed by the Defendant, to which last action of the Court the Plaintiff duly excepted.

And now, on this the 26th day of May, 1932, the Court finds that the Plaintiff, The Texas and Pacific Railway Company, is not entitled to have or recover any relief herein against the Defendant, S. O. Pottorff, Receiver of The First National Bank of El Paso, Texas. The Court further finds that the Defendant is entitled to have an Order and Judgment decreeing that the pledge contract dated the 29th day of January, 1931, and by the terms of which the said The First National Bank of El Paso, Texas, purported to create a lien in favor of the plaintiff upon seven United States Government Fourth Liberty loan four and one-quarter coupon bonds, 1933 to 1938, of the aggregate principal amount of $50,000.00, described by numbers and amounts as follows:

G00129907	$ 5,000.00
A00115901	5,000.00

E00040105	5,000.00
K00129870	5,000.00
G00353057	10,000.00
H00353058	10,000.00
H00298068	10,000.00

was and is void and of no effect, and entitled to have Judgment decreeing that said Liberty bonds are a part of the general assets of The First National Bank of El Paso, Texas, which passed to and became the property of the Defendant, and that same constitute assets to be administered by him for the benefit of the general creditors of the First National Bank.

IT IS THEREFORE, on this day, ORDERED, ADJUDGED and DECREED by the Court that the Plaintiff, The Texas and Pacific Railway Company take nothing by this suit, and that as to Plaintiff's suit the Defendant recover of and from Plaintiff all costs in this behalf incurred.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that the pledge agreement above described was and is void and of no force and effect.

IT IS FURTHER ORDERED and DECREED that any cloud existing on the Defendant's title to said Liberty bonds by reason of the above mentioned contract, and by reason of the assertion of any claims to said bonds by the Plaintiff be, and the same is hereby removed.

IT IS FURTHER ORDERED and DECREED that said Liberty bonds are the property of the Defendant, constituting assets of his trust, to be administered by him for the benefit of the general creditors of The First National Bank of El Paso, Texas, and it is further OR-

DERED that the Plaintiff, The Texas and Pacific Railway Company, desist from asserting any further rights or claims in said Liberty bonds.

IT IS FURTHER ORDERED that the Defendant recover of and from the Plaintiff his costs in this behalf incurred, and that all writs necessary and proper for the collection of such costs issue, and that the officers of the Court have their writs against the respective parties for the costs by each of said parties respectively incurred, to all of which action of the Court the Plaintiff, in open court, duly excepted.

CHARLES A. BOYNTON,
Judge.

O. K.:
T. HARDIE
O. K. DEL W. HARRINGTON
S. N. RUSSELL

Filed June 21, 1932 (El Paso Division) D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, By Flora L. Linker, Deputy Clerk.

Statement of Evidence and Bill of Exceptions.

BE IT REMEMBERED, That on this Wednesday, May 25, A. D. 1932, the above entitled and numbered cause came on for trial before the Honorable Charles A. Boynton, a United States District Judge in and for the Western District of Texas, at El Paso, Texas; the Complainant being represented by S. N. Russell, Esq. and D. W. Harrington, Esq., of El Paso, Texas, and M. E. Clinton, Esq., of Dallas, Texas, and the defendant being represented by Messrs. Jones, Goldstein, Hardie & Grambling, of El Paso, Texas; during the trial of which said cause the following facts were adduced in evidence,

objections made, and exceptions reserved by the parties:

The pleadings of the parties were read to the Court.

Motions to dismiss and motions to strike were presented to the Court, and ruling withheld by the Court until the following developing of the facts in the case.

The following stipulation and agreed statement of certain facts was introduced, and read to the Court:

(Omitting the style and number of the case).

The parties to the cause styled, numbered and pending as above, in part submit the matters in controversy between them to the courts upon the following agreed statement of facts:

I

(a) The Texas and Pacific Railway Company was on January 1, 1931, and at all times thereafter and now is a corporation duly chartered, organized and existing under and by virtue of the laws of the United States, to-wit: An Act of Congress entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and Acts amendatory thereof and supplementary thereto, including an Act of Congress approved May 2, 1872, whereby, among other things, the name, style and title of said Texas Pacific Railroad Company was changed to "The Texas and Pacific Railway Company." A copy of said Acts of Congress is attached hereto, marked Exhibit "A" and made a part hereof.

(b) The Texas and Pacific Railway Company has its principal office and place of business at Dallas in Dallas County in the Dallas Division of the Northern District of Texas, and owns and operates in interstate and

in intrastate commerce a line of railroad from New Orleans in the State of Louisiana to El Paso in the State of Texas, over which a large volume of interstate traffic is constantly moving; and as such carrier is subject to all applicable provisions of the Interstate Commerce Act, as amended in 1920.

II

S. O. Pottorff, Receiver of the First National Bank of El Paso, is the duly appointed, qualified and acting Receiver of said bank, an insolvent national banking association, and is now residing in and acting as such Receiver in El Paso County of the El Paso Division of the Western District of Texas.

III

This is a suit in equity which the District Court of the United States for the Western District of Texas, El Paso Division, is given original jurisdiction by Section 41, paragraphs 1 and 6, Title 28, and by Section 94, Title 12, of the Code of Laws of the United States, as revised and enacted by Congress on June 28, 1926, and approved on June 30, 1926.

IV

The Texas and Pacific Railway on July 3, 1922, was being operated by J. L. Lancaster and Charles L. Wallace, Receivers appointed by the District Court of the United States in and for the Western District of Louisiana, Monroe Division, and on said date upon petition filed by said Receivers, an order was made and entered by said Court authorizing said Receivers to select The First National Bank of El Paso as an additional depository for receivership funds, which order, among other things, provided that said bank "shall be required to furnish bonds

with good and solvent sureties * * * * in such an amount as will substantially equal the estimated average balances to be carried by said Receivers in said bank." A copy of said petition and order is attached hereto, marked Exhibit "B" and made a part hereof.

V

The First National Bank of El Paso, as principal, and National Surety Company, as surety, on July ....., 1922, executed and delivered to J. L. Lancaster and Charles L. Wallace, Receivers of The Texas and Pacific Railway Company, their certain surety bond for the sum of $25,000.00 conditioned as required by the aforesaid order of said Court, and thereupon said Receivers opened an account with said bank and made deposits therein approximately in the amount of said surety bond. A copy of said surety bond is attached hereto marked Exhibit "C" and made a part hereof.

VI

Said receivership of The Texas and Pacific Railway Company was terminated on or about May 14, 1924, and upon written request of The Texas and Pacific Railway Company, said The First National Bank of El Paso, as principal, and National Surety Company, as surety, on or about August 7, 1924, executed and delivered to said railway company a new surety bond in the sum of $25,000.00, payable to the Texas and Pacific Railway Company, a copy of which bond is attached hereto, marked Exhibit "D" and made a part hereof.

VII

The deposits of The Texas and Pacific Railway Company with The First National Bank of El Paso increased

during the month of April, 1927, and upon the written request of said railway company, The First National Bank of El Paso, as principal, and Maryland Casualty Company, as surety, on or about April 25, 1927, executed and delivered to The Texas and Pacific Railway Company an additional surety bond in the sum of $25,000.00, a copy of which bond is attached hereto, marked Exhibit "E" and made a part hereof.

VIII

(a) That on or about January 29, 1931, the officers of said The First National Bank of El Paso, while said bank was solvent and a going concern, with the full knowledge and approval of the board of directors of said bank, and pursuant to a certain substitution agreement between the officers of said bank and the officers of said railway company, deposited in the Trust Department of said bank with its Trust Officer, its certain (7) United States Government Fourth Liberty Loan 4¼ Coupon Bonds, 1933-38, of the aggregate amount and value of $50,000.00, described by numbers as follows, to-wit:

G00129907	$5,000.00
A00115901	$5,000.00
E00040105	$5,000.00
K00129870	$5,000.00
G00353057	$10,000.00
H00353058	$10,000.00
H0029068	$10,000.00

Said liberty bonds were so deposited with said Trust Officer separate and apart from all assets and securities of said bank, and in a separate envelope or receptacle bearing the name of said railway company, together with a copy of that certain trust agreement executed on or about January 29, 1931, by said First National Bank of

El Paso, acting by and through F. M. Murchison, its president, and J. E. Benton, its cashier, with the full knowledge and approval of the board of directors of said bank. A copy of said trust agreement is attached hereto, marked Exhibit "F" and made a part hereof.

(b) Thereupon, said surety bonds were cancelled as of January 30, 1931, and The Texas and Pacific Railway Company thereafter relied upon said liberty bonds and upon said agreement of said The First National Bank of El Paso as security for the repayment, upon its demand, of all monies deposited to its credit in said bank.

(c) But for said agreement of said officers of The First National Bank of El Paso and the aforesaid agreement of said bank and the deposit of said liberty bonds as aforesaid, The Texas and Pacific Railway Company would not have permitted the cancellation of said surety bonds; or, had they been cancelled said railway company would have immediately withdrawn all monies on deposit to its credit in said The First National Bank of El Paso and would have closed its account with said bank.

IX

(a) After said trust agreement had been executed and said liberty bonds had been deposited with said Trust Officer as aforesaid, and in reliance thereon, The Texas and Pacific Railway Company continued to make deposits in said The First National Bank of El Paso and maintained an average daily deposit in said bank in excess of $50,000.00; and said bank continued to accept and pay said railway company's checks and drafts drawn against its said deposits until on or about September 4, 1931, when said bank failed, became insolvent, closed its doors to the public and refused to accept, honor or pay any other or further checks or drafts drawn by said railway company against said deposits.

(b) The Texas and Pacific Railway Company had on deposit to its credit in said bank on September 4, 1931, the sum of $54,646.94, including accrued interest, which sum of money it was entitled to receive of and from said bank upon demand, and which sum of money, except the accrued interest, said railway company had collected for common services rendered in the transportation of both interstate and intrastate commerce.

(c) The Comptroller of the Currency of the United States, on or about September 6, 1931, duly and regularly appointed S. O. Pottorff, Receiver of said The First National Bank of El Paso, and said Receiver on or about September 8, 1931, took charge of all the affairs, assets and securities of said bank, and said Receiver on said date also took possession of the Trust Department of said bank in which said liberty bonds were held as security for the deposits of monies by said railway company in said bank, as aforesaid, and said Receiver has ever since said date held said bonds and now holds the same in his possession.

(d) The Texas and Pacific Railway Company, acting by and through its duly authorized officers and agents, seasonably made demand upon said Receiver for the payment to it of the same sum of $54,646.94, which sum said Receiver refused and now refuses to pay.

(e) The Texas and Pacific Railway Company, acting by and through its duly authorized officers and agents, seasonably demanded that said Receiver turn over to said railway company said liberty bonds, and that he credit its claim against said Receiver with the market value of said bonds at the time of said delivery, which demand said Receiver refused and now refuses.

(f) That upon the refusal of said Receiver to turn over to The Texas and Pacific Railway Company said

liberty bonds as aforesaid, it, acting by and through its duly authorized officers and agents, demanded that said Receiver sell said liberty bonds and apply the proceeds from the sale thereof to the liquidation of said railway company's claim, which said demand said Receiver refused and now refuses to comply with.

X

Said Receiver of the First National Bank of El Paso is unable to pay the unsecured depositors of said bank the full amount of their deposits.

XI

(a) The facts set out above are agreed to by the parties to this case, each reserving the right to object to any of the facts set out that they consider cannot legally be considered as evidence on the trial of this case, and each party reserves the full and complete right to introduce any further testimony, facts or documents that it, or they may desire, and to introduce *testiny* supplemental to or completing in any way the facts agreed to, each party at all times reserving the right to make any objection as to the admissibility of the same that it may see fit.

(b) This agreed statement of facts shall be filed with the papers in this cause, and the same shall constitute a part of the record herein.

Witness the hands of the attorneys of record for the respective parties.

(Signed) S. N. RUSSELL,
M. E. CLINTON,
Attorneys for Plaintiff, The Texas and Pacific Railway Company.

JONES, GOLDSTEIN, HARDIE & GRAMBLING,
(Signed) A. H. GOLDSTEIN,
By T. HARDIE,
Attorneys for Defendant, S. O. Pottorff, Receiver of the First National Bank of El Paso.

Attached to the Agreed Statement of Facts, and made a part thereof, is certified copy of Complainant's Charter and amendments, as referred to in Paragraph I, Subdivision (a), of the Agreed Statement of Facts.

Section 19 of the original Charter granted to the Texas Pacific Railroad Company provides as follows:

"Sec. 19. That the Texas Pacific Railroad Company shall be, and it is hereby declared to be, a military and post road; and for the purpose of insuring the carrying the mails, troops, munitions of war, supplies, and stores of the United States, no act of the company nor any law of any State or Territory shall impede, delay, or prevent the said company from performing its obligations to the United States in that regard: Provided, that said road shall be subject to the use of the United States for postal, military, and all other governmental services, at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service, and the Government shall at all times have the preference in the use of the same for the purposes aforesaid."

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE WESTERN DISTRICT OF LOUISIANA.
MONROE DIVISION.

B. F. BUSH, Receiver of the railroads, etc., of St. Louis, Iron Mountain & Southern Railway Company,

Complainant, No. 1120

against In Equity

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Defendant.

To the Honorable, Rufus E. Foster, Judge of said Court:

The petition of J. L. Lancaster and Charles L. Wallace, Receivers herein, would respectfully represent that by an order made herein on the 4th day of November, 1916, certain banks located at various points along the line of road in charge of your Receivers were designated as depositories of the funds of the Receivers.

Your petitioners would state that El Paso, Texas, is at the extreme Western Termini of the line of road in their charge, and that the State National Bank of El Paso was designated depository by the order of November 4, 1916.

Your petitioners would respectfully state that, in their opinion, an additional depository should be had at El Paso, and that it is to the interest of your Receivers to have the Court designate the First National Bank of El Paso as a bank in which your Receivers are authorized to deposit their funds.

The said First National Bank of El Paso, is the largest bank in El Paso, is solvent in every way, and is in a condition to be of service to your Receivers in many ways.

That said bank will comply with the order of Court applying to other depositories and will give bond to protect your Receivers against any loss.

J. L. LANCASTER AND
CHARLES L. WALLACE

Receivers of The Texas and Pacific Railway Company.

(Signed) By THOMAS J. FREEMAN,
General Counsel for Receivers.

EXHIBIT A.

ORDER

Upon the filing and reading of the foregoing petition, and upon consideration thereof, it is ordered that the Receivers herein are authorized to select as an additional depository of the funds of the Receivers, the First National Bank of El Paso, Texas.

That said First National Bank of El Paso, Texas, shall be required to furnish bond with good and solvent sureties, (either corporation or individual) in such an amount as will substantially equal the estimated average daily balances to be carried by said Receivers in said bank.

Thus done and signed, this the 3rd day of July, 1922.

(Signed) RUFUS E. FOSTER,
United States District Judge.

Filed July 6, 1922
W. Lee, Clerk,
U. S. Dist. Court,
Western Dist. of Louisiana.

EXHIBIT B.

DEPOSITORY BOND

The State of Texas,
County of El Paso.

KNOW ALL MEN BY THESE PRESENTS, That we, The First National Bank of El Paso, Texas, as principals, and .....

as sureties, acknowledge to owe and be indebted jointly and severally to John L. Lancaster and Charles L. Wallace, Receivers, of The Texas and Pacific Railway, and their successors in office, in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) for the payment of which well and truly to be made, we hereby bind ourselves, our successors, assigns and legal representatives jointly and severally.

In witness whereof we have hereunto set our hands at EL PASO, TEXAS, this ..... day of July, A. D. 1922.

But the above obligation is subject to the following condition: That if the said THE FIRST NATIONAL BANK OF EL PASO, TEXAS, shall well and truly on demand, pay over and deliver to the said John L. Lancaster and Charles L. Wallace, Receivers, as aforesaid of The Texas and Pacific Railway, or their lawful successors in office, all and such sums of money, funds and valuables, general and special, as may now be on deposit, and as may be deposited hereafter by said Receivers or their lawful successors in office, or that may come into custody or control of said THE FIRST NATIONAL BANK OF EL PASO, TEXAS, for account of said Receivers, then and in that case the above obligation shall become null and void; otherwise to remain in full force and effect.

THE FIRST NATIONAL BANK OF
EL PASO,

By .....
President.

.....

.....

.....

.....

ATTEST:

.....

Cashier

EXHIBIT C.

THE STATE OF TEXAS,
COUNTY OF EL PASO.

KNOW ALL MEN BY THESE PRESENTS, That We, The First National Bank of El Paso, Texas, as principals, and The National Surety Company of New York, as surety acknowledge to owe and be indebted jointly, severally and in solido to The Texas and Pacific Railway Company, in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) for the payment of which well and truly to be made, we hereby bind ourselves, our successors, assigns and legal representatives jointly, severally and in solido.

IN WITNESS WHEREOF we have hereunto set our hands at El Paso, Texas, this 7th day of August, A. D. 1924.

But the above obligation is subject to the following condition: That if the said The First National Bank of El Paso, Texas, shall well and truly, on demand, pay over and deliver to The Texas and Pacific Railway Company, or its order, all and such sums of money, funds and valuables, general and special, as may now be on deposit by, in favor of, or in the name of The Texas and Pacific Railway Company with the said The First National Bank of El Paso, Texas, and as may be deposited hereafter by The Texas and Pacific Railway Company or by any one for its account, with the said The First National Bank of El Paso, Texas, or that may come into the custody or control of said The First National Bank of El Paso, Texas, for account of The Texas and Pacific Railway Company, then and in that event the above obligation

shall become null and void; otherwise to remain in full force and effect.

In event it becomes necessary to enforce the obligation of this bond by suit, all costs of same, including attorney's fees, are to be paid by the principals and surety herein.

FIRST NATIONAL BANK,
EL PASO, TEXAS,
By JAMES G. McNARY,
President.

ATTEST:
(Signed) J. E. BENTON,
Cashier.
(SEAL)

NATIONAL SURETY COMPANY,
Surety,
By A. M. CLARK,
Vice-President, Surety.

ATTEST:
A. C. MILLIKAN,
Asst. Secretary.
(SEAL)

EXHIBIT D.

MARYLAND CASUALTY COMPANY
BALTIMORE

DEPOSITORY BOND.

STATE OF TEXAS,
COUNTY OF EL PASO.

KNOW ALL MEN BY THESE PRESENTS:

That we, The First National Bank of El Paso, Texas, as principals, and MARYLAND CASUALTY COMPANY of Baltimore, Maryland, as surety, acknowledge to owe and be indebted jointly, severally and in solido

to The Texas and Pacific Railway Company, in the sum of TWENTY FIVE THOUSAND DOLLARS ($25,000.-00) for the payment of which well and truly to be made, we hereby bind ourselves, our successors, assigns and legal representatives jointly, severally and in solido.

IN WITNESS WHEREOF we have hereunto set our hands at El Paso, Texas, this 25th day of April, A. D. 1927.

But the above obligation is subject to the following condition: That if the said The First National Bank of El Paso, Texas, shall well and truly, on demand, pay over and deliver to The Texas and Pacific Railway Company, or its order, all and such sums of money, funds and valuables, general and special, as may now be on deposit by, in favor of, or in the name of The Texas and Pacific Railway Company with the said The First National Bank of El Paso, Texas, and as may be deposited hereafter by The Texas and Pacific Railway Company or by any one for its account, with the said The First National Bank of El Paso, Texas, or that may come into the custody or control of said The First National Bank of El Paso, Texas, for account of The Texas and Pacific Railway Company, then and in that event the above obligation shall become null and void; otherwise to remain in full force and effect.

In event it becomes necessary to enforce the obligation of this bond by suit, all costs of same, including attorney's fees, are to be paid by the principals and surety herein.

The Surety shall have the right to terminate its suretyship under this obligation by serving notice, in writing, of its election so to do, upon said The Texas and Pacific Railway Company, or its lawful representatives, and thereupon the said Surety shall be discharged from any and all liability hereunder for any default of the Prin-

cipal occurring after the expiration of thirty (30) days after the service of such notice.

WITNESS OUR HANDS AND SEALS.

FIRST NATIONAL BANK OF EL PASO,
By F. M. MURCHISON,
Vice-President.

ATTEST:
J. E. BENTON,
Cashier.
(SEAL)

MARYLAND CASUALTY COMPANY,
Surety,
By HERMAN A. TAYLOR,
Attorney-in-Fact.

(SEAL)

EXHIBIT E.

STATE OF TEXAS,
COUNTY OF EL PASO.

THIS INSTRUMENT WITNESSETH:

The Texas & Pacific Railway Company, a corporation, carries an open checking account with the undersigned, The First National Bank of El Paso, in El Paso, Texas, and desires to continue so to do, and the Bank desires to continue to hold the said deposit.

For the purpose of securing the said Texas & Pacific Railway Company against any loss that might possibly occur by reason of its continuance and maintenance of the said deposit, The First National Bank of El Paso has on this date deposited in its Trust Department, and with its Trust Officer, which fact is evidenced by the signed statement to that effect of the said Trust Officer hereto attached, United States Government Liberty

Bonds of the par value of Fifty Thousand ($50,000.00) Dollars, to be held by the said Trust Department, through its Trust Officer, in trust for the use and benefit of the said Texas & Pacific Railway Company. This is for the purpose of protecting it against loss as aforesaid, and it is agreed that the said Bonds shall, at all times, remain in the Trust Department as such security. Provided, however, that should the Bank at any time desire to withdraw the Liberty Bonds herewith deposited, and substitute therefor other bonds of the United States of America of equal par value, it shall have the right so to do.

Upon the closing of the said account, and only then, shall the said The First National Bank of El Paso have the right to withdraw the said securities from its Trust Department.

IN WITNESS WHEREOF, the said The First National Bank of El Paso has caused this instrument to be executed in duplicate by its President, attested by its Cashier or Assistant Cashier, and its corporate seal hereunto affixed, at El Paso, Texas, this 29th day of January, 1931, one copy being delivered to the Texas & Pacific Railway Company and one copy deposited with the Bonds with the Trust Department.

THE FIRST NATIONAL BANK OF
EL PASO,
(Signed) F. M. MURCHISON,
President.

ATTEST:
(Signed) J. E. BENTON,
Cashier.
(Seal of The First National Bank of El Paso).

STATE OF TEXAS,
COUNTY OF EL PASO.

I, H. W. Moore, Trust Officer of the First National

Bank of El Paso, hereby acknowledge receipt to the Trust Department of the said Bank of the Bonds above named and upon the conditions therein set forth.

(Signed) H. W. MOORE,
Trust Officer,
The First National Bank of El Paso.

EXHIBIT F.

ADMISSION: It was admitted by the parties that the Liberty Bonds now held by the Receiver are the same bonds that were pledged by the Bank to the Railway Company.

A. L. EWING,

a witness for Complainant, being first duly sworn, testified as follows:

ON DIRECT EXAMINATION:

My name is A. L. Ewing. I am Assistant Treasurer of The Texas and Pacific Railway Company. I have been an official of that company thirty years, as Paymaster and Assistant Treasurer. I have been Assistant Treasurer since 1919. My duties as Assistant Treasurer are to protect the cash received and disbursed.

The Texas and Pacific Railway Company has a policy with reference to having its bank accounts secured.

Q What is that policy?

COUNSEL FOR DEFENDANT: Now, if the Court please, I object to that; it is not material what the policy of The Texas and Pacific is with reference to its deposits.

THE COURT: The Court can hardly see the materiality of the policy the railroad corporation may

have followed or had. The question is here at issue what was done with reference to these particular funds.

COUNSEL FOR COMPLAINANT: It is admitted with reference to how this particular transaction was handled.

THE COURT: The Court does not see, in view of that, what the materiality is of what had been the policy.

COUNSEL FOR COMPLAINANT: If the Court please, for the purpose of the bill may it be shown that the testimony would be to the effect that that was the policy of the Texas and Pacific, and had been pursued for many years prior to this time?

THE COURT: The Court will be reasonably liberal in matters tried before the Court, and let these matters be elaborated. It appears to the Court the objection is probably well taken. I will overrule the objection and unless you connect it up—The Court does not see the materiality of it, but the Court is going to pass upon this testimony.

COUNSEL FOR DEFENDANT: We except.

Q What did you say the policy of the railway company was with reference to requiring security?

A To accept a depository bond to protect the deposits in the banks.

Q State whether or not the railroad company required security for its deposits in all banks in which it made deposits?

A Yes, sir, with one exception, and that was a small bank, a small account down in Louisiana, in the Hibernia Bank of New Orleans.

(Defendant declined to cross examine the witness).

(Witness excused)

FRANK M. MURCHISON,

a witness for Complainant, being first duly sworn, testified as follows:

ON DIRECT EXAMINATION:

My name is Frank M. Murchison. I was connected with The First National Bank of El Paso from January, 1920, to the time it closed its doors on September 4th of last year. I was first connected with the bank as Vice-President, and was elected President of the bank in January, 1930; I do not recall the exact date.

During my term as President The First National Bank carried a part of the Texas and Pacific Railway Company's account or money in El Paso. I think the bank first procured this company's deposits in 1924. I was then Vice-President of the bank.

The railroad company required security for its deposit in The First National Bank. After the receivership ended in about 1924 the bank was then required by the railway company to make bond to The Texas and Pacific Railway Company. It is my recollection that bond for the amount of $25,000.00 in the National Surety Company was first made by the bank to the railroad company for the purpose of securing its account. There was a premium charged by the insurance company on that bond, and the bank paid the premium.

Up to about January 29, 1931, the bank carried insurance security by which the T. & P. Railway Company's account in the Bank was secured by surety bonds in the amount of $50,000.00, and the bank paid the premiums on those bonds.

Some time in January, 1931, it was decided by me, as President of the bank, and some of the other officers of the bank, to save the premiums on the surety bonds by substituting Liberty Bonds as surety for the Texas and Pacific Railway Company's account, in lieu of those bonds. Mr. Benton and myself, as I recall it, were discussing this matter of the premiums on this bond, as well as another one or two, and that the bank had been paying; so we decided to take it up with The Texas and Pacific Railroad people, the matter of the substitution of bonds, of Liberty bonds for the surety bonds, in order to save this premium that the bank had been paying. With that in mind Mr. Benton, at my suggestion, went down to Dallas to see Judge Lancaster, and made an arrangement with him in connection with it.

Pursuant to Mr. Benton's visit to Dallas Liberty Bonds were pledged with the Trust Department of The First National Bank, and a trust agreement entered into. Mr. Benton handled the details with reference to handling of the bonds and of preparing the pledge agreement. He did that under my direction, I knew what was being done, and with my approval.

This is my signature (indicating), and this is Mr. Benton's signature. The third signature there is Mr. H. W. Moore's, Assistant Trust Officer and Assistant Cashier of The First National Bank.

The document, being marked "C-1", was introduced in evidence by Complainant; said document being the trust agreement, and being the same document as hereinbefore copied in full herein, marked "Exhibit F" to agreed statement of facts, and reference is here made to same.

My recollection is that the approximate average

amount of money that The Texas and Pacific carried in The First National Bank from the time of the termination of the receivership, from the time the second bond was required, up to the time that the Liberty Bonds were pledged in lieu of the surety bond, was approximately the amount of the bond, $50,000.00. After the substitution of the Liberty Bonds up to the time the bank closed on September 4, 1931, I think the average amount of money carried by the railway company in the bank was approximately $50,000.00.

Those deposits were made by the City Ticket Office and the El Paso Union Depot Company here in El Paso. I do not recall whether there were any outside deposits made here. The deposits I have mentioned were made daily. I am not in position to state the average amount of those daily deposits, not even approximately. Likewise I would not know the amount of withdrawals.

(Defendant declined to cross examine the witness).

(Witness excused).

J. E. BENTON,

a witness for Complainant, being first duly sworn, testified as follows:

ON DIRECT EXAMINATION:

My name is J. E. Benton. I was formerly Vice President and Cashier of The First National Bank here in El Paso. I was connected with that bank since February, 1903. I was made Vice-President of the bank I think in 1920, and held that position until it closed. I was also Cashier of the bank. I can't give you definite dates I was Cashier because I have been Cashier two or three times. When I was made Vice President another man was elected Cashier, and when he left the bank I was elected

Cashier, and then another party was elected Cashier, and when he left I was elected Cashier again.

I was Cashier in 1931.

The account of The Texas and Pacific Railway Company in The First National Bank was secured by a surety bond up to about the 29th of January, 1931. The First National Bank paid the premium on the bond.

At the instance of Mr. Murchison and other officers of the bank it was agreed to save the premiums on the surety bonds by substituting Liberty Bonds in lieu thereof, if such substitution would be agreeable to the officials of the railway company. In pursuance of that agreement by the officers of the bank I went down to Dallas and met Mr. Lancaster. He was taking the train for Cleveland and I rode from Dallas to Longview with him in the drawing room and explained the purpose of my visit, and that we wanted to substitute Liberty Bonds and cancel the depository bond.

That was Mr. J. L. Lancaster, President of The Texas and Pacific.

Q State what conversation you had with Mr. Lancaster with reference to the substitution of those bonds?

COUNSEL FOR DEFENDANT: I don't know the nature of the conversation, but I think it is wholly immaterial whatever the conversation might have been. Certainly we can't change the law by the bank trying to get Liberty Bonds substituted for a surety company bond with the railway company; I don't see how it could affect any issue in this case.

THE COURT: The Court is rather disposed to concur in the statement of the law as made by counsel for the defendant, but is disposed to allow a good deal of latitude in this testimony. They have an allegation here, I believe, that but for this being done

the deposit might be withdrawn, and so forth. The Court will overrule the objection.

Defendant excepted.

A I told him the purpose of my visit was to ask him to accept Liberty Bonds as surety on The Texas and Pacific account in The First National Bank in lieu of the depository bond. I told him it would save us $250.00 a year premium, and he in substance said he would permit that substitution provided that I could assure him that it was legal, and I told him that I would take it up with our attorneys when I got back and if it was not I would not ask him to go through with it; if it was I would have the papers drawn up by the attorneys for the bank, and send them to him.

Turney, Burges, Culwell & Pollard were attorneys for the bank.

With reference to whether Mr. Lancaster said anything with reference to the withdrawal of the account unless it was secured, Mr. Lancaster said that that time, "Of course, you know this is not my personal policy, it is the policy of the railway company to have their funds secured, that is deposited in banks, and what we want is security, and after your investigation if you tell me the way you propose to secure it is all right you can go on and do it."

I then returned to El Paso. I went up and told Mr. Burges of my interview with Mr. Lancaster, and the purpose of it, and asked him if that could be done.

Q What was his reply?

COUNSEL FOR DEFENDANT: I certainly do not think it is material to go into Mr. Burges' opin-

ion about the law; he certainly could not change the law by his opinion.

THE COURT: No, that is very true. The Court realizes your allegations, and will overrule the objection, and permit the testimony to be introduced.

A As I have stated, I told him of my conversation with Mr. Lancaster, and the purpose of my visit, and I wanted a contract drawn up, binding, so that we could put up Liberty Bonds as surety for the account; explained in detail the circumstances as I have said. He said that could be done, and drew the contract up.

Mr. Burges advised me that would be legal, the substitution of the Liberty Bonds for the surety bond. I then sent a copy, of one of the contracts, to Mr. Lancaster, and turned one of them over to Mr. Moore, Trust Officer of the bank, and attached the bonds to be placed in the trust agreement, with Mr. Moore as Trust Officer, in accordance with the terms of the contract. I presume those are the same Liberty Bonds described in the petition here.

That transaction was made in the regular course of the bank's business, in good faith.

Q Do you know whether the bank was benefitted or injured by the substitution of the Liberty Bonds for the surety bond?

COUNSEL FOR DEFENDANT: I think that calls pretty much for a conclusion.

THE COURT: The Court sustains the objection to this question. That is a matter that might be deduced from the testimony in the case; it might be a matter of conjecture, considerable speculation. The Court sustains the objection.

COUNSEL FOR COMPLAINANT: We except to the ruling of the Court.

Mr. Lancaster said, "This is not a personal policy of mine; it is the policy of the railroad company to insist upon security for funds placed in banks, so if you assure me it is good security you may go through with it."

I do not know the approximate amount of the daily deposits made in the bank by the railway company from the 1st of January, 1931, up to the time the bank closed. The average amount on deposit was around $50,000.00 all the time. There were withdrawals from the bank in various forms. There would be checks presented, drawn by Mr. Ewing's office, but I don't know to whom. I don't think they were to empolyees here in El Paso. More or less claim accounts or something of that sort; and then they transferred funds in larger amounts to depositories elsewhere.

Employees in El Paso cashed their pay checks with that bank. On the back of the pay check it provides "This check is payable at The First National Bank, El Paso," naming other banks on their line.

Q Was the bank benefitted in any other way other than by saving the premiums on the surety bond?

A Yes, sir.

Q In what other way?

A In the prestige it gained.

COUNSEL FOR DEFENDANT: We had an objection which was sustained.

THE COURT: The Court sustains the objection.

COUNSEL FOR COMPLAINANT: We except.

I was employed by The First National Bank approximately twenty-eight or thirty years. That bank was examined by the National Bank Examiners; I imagine two or three times a year, as much as twice a year, and maybe oftener. There was an examination made in August prior

to the time the bank closed in September. It seems to me like it was the beginning of August, probably the first week in August. There were probably six or seven or eight examiners who made the examination at that time.

These Liberty Bonds were placed in the Trust Department of the bank, and there was a record of that fact made in our books in the bank.

In that examination of the bank some examiners handled certain portions of the business and others other portions. The trust accounts ordinarily would have been inspected probably within a week after the inspection was commenced.

I don't know all of the powers of a bank examiner. It is my understanding they have authority to close a bank.

Q State if an irregularity or an unlawful transaction had been shown on the records of the bank's books, and that had been seen by a bank examiner what would they have done?

COUNSEL FOR DEFENDANT: He can't be going by his past experience in The First National Bank when he answers that question, certainly, what the bank examiners did in closing a bank as soon as he found irregularities in a National bank.

COUNSEL FOR COMPLAINANT: No, I am not saying that.

THE COURT: The Court sustains the objection. Now, as to what the bank examiner did do, if the bank examiner in making his report made some notation in reference to this deposit, as shown by the records of the bank, that probably would be the best evidence of what the bank examiner did. The answer elicited by this interrogatory calls for a conclusion of this witness of law and fact, in the opinion

of the Court. The Court sustains the objection.

COUNSEL FOR COMPLAINANT: We except, for the reason we expect to prove by the witness that if the Comptroller, who was then acting through his examiner, had contended that the placing of these Liberty Bonds in lieu of the other bonds was unlawful or beyond the powers of the bank, that the bank examiner would have immediately called the bank's attention to that fact, and required it to be remedied.

THE COURT: Very well. The Court sustains the objection.

Q Was there any complaint, Mr. Benton, to the officials of the bank by the examiner on account of the Texas and Pacific Railway Company's account being secured by these Liberty Bonds?

A Not that I know of, no, sir; I didn't hear of any.

Q Would you have known it if it had been made?

A Yes, sir.

COUNSEL FOR DEFENDANT: That calls for a conclusion of the witness.

Q Who would it have been made to?

THE COURT: The Court sustains the objection to the last question.

Q You say there was no complaint?

A There was no complaint made to me, no, sir, or anyone else that I know of.

Mr. Murchison was the executive in charge of the bank. Complaints of that nature would have been made to Mr. Murchison or to me, usually to Mr. Murchison; he was the head of the bank. I say usually. Most often, most always the case.

There was a saving to the bank by reason of its being

enabled to avoid payment of the premiums on the surety bond by reason of the substitution of the Liberty Bonds. The Liberty Bonds drew interest, and the bank received that interest.

ON CROSS EXAMINATION:

Q Mr. Benton, this report of the August examination of the bank was never finally completed and sent in to the Comptroller until after the bank closed, was it?

A Not to my knowledge, no, sir.

I said that the acceptance of the pledge of the Liberty Bonds by Texas and Pacific Railway Company was a benefit to the bank. As a matter of fact from the time that pledge of Liberty Bonds was made, from February, I believe, the deposits in the bank continuously decreased, up until the bank closed, the total deposits in the bank.

Q As a matter of fact when you told of the bank's reason for changing from a surety bond to the pledge of Liberty Bonds, you had already received a request from the Maryland Casualty Company in the form of a letter to relieve them from that guaranty, hadn't you?

COUNSEL FOR COMPLAINANT: We object to that as being wholly irrelevant, immaterial, and incompetent for any purpose in this case.

THE COURT: The Court will permit the witness to answer that question in view of the fact on direct examination this witness has been interrogated as to why the change was made, and as an incident that might be taken into consideration for determination as to the various reasons that may have prompted the change. The Court feels that perhaps it is proper, and probably is on cross examination, to ask the witness whether he had received notification

from the surety company to decline to further act. The Court will overrule the objection to that question, and allow that question to be asked.

COUNSEL FOR COMPLAINANT: We except.

THE COURT: The letter would be the best evidence. Is there objection on that ground?

COUNSEL FOR COMPLAINANT: Yes, sir, we make that objection.

COUNSEL FOR DEFENDANT: I want to show the witness had knowledge of that fact. This is not a case where we are suing on the letter, or suing on an instrument.

THE COURT: The Court overrules the objection.

COUNSEL FOR COMPLAINANT: We except.

A I don't know of any specific letter on that account from the Maryland Casualty Company.

Q You knew they had requested withdrawal from their depository bonds with The First National, didn't you?

A I didn't know that they made a general letter; I knew there was a ruling on it with Hudspeth County, and I knew Mr. Scales told us they were going to get off all bonds.

Q As a matter of fact, your real purpose, Mr. Benton, was to get the substitution made because you knew you were going to have to give up this Maryland Casualty bond?

A I don't think there is any doubt but what we would have eventually, but I don't think that they were notified.

Q That was the reason, purpose for the substitution, not for the saving of the $250.00 you had been paying eight or nine years?

A That was not all of it; that was not the only consideration, because we knew eventually they would ask to have the bond cancelled, or would not renew it. Mr. Scales had told us he had been instructed not to renew any more depository bonds.

Mr. Scales was the agent for the Maryland Casualty Company; he represented them here.

At the time I went to Dallas at the expense of the bank to get this substitution made I don't think we had been instructed or that Scales had told us about the depository bond; I don't think there was any specific instructions, but I absolutely knew what the attitude was. I did not know when they withdrew we could not get any other surety company, any standard insurance company, to take that risk, but I had a good hunch.

Q Especially in view of the record withdrawals of deposits from the bank?

A Scales had told us it was the policy of his company not to renew any more bonds.

ON REDIRECT EXAMINATION:

I did not mention to Mr. Lancaster at the time this substitution agreement was made, or at any other time thereafter; this substitution was desired on account of the surety company threatening to cancel its bonds. He never heard of that, as far as know. The bond provides that he was to be notified in case of cancellation, but I did not mention that in my discussion with Mr. Lancaster in any manner.

Mr. Scales did not tell me it was the attitude or disposition of his company to refuse to renew any surety bonds, but I got information in the bank that he had received a wire or letter to the effect not to write any more depository bonds.

Q For anybody? Was that general, or just for The First National?

A That is what he told us.

Q Mr. Benton, were any other accounts in the First National Bank secured by the bank?

COUNSEL FOR DEFENDANT: I fail to see the materiality of that question. I object to it on the ground it is immaterial to any issue in the case.

THE COURT: The Court does not see the materiality of that testimony, and the Court sustains the objection; or will hear from counsel as to why you consider the same as material, and without going too far adrift, necessitating the inquiring into conditions arising in connection with giving security in each and every instance the bank may have put up security.

COUNSEL FOR COMPLAINANT: It shows, your Honor, I think, the practice and custom, or probability of the knowledge on the part of the Comptroller, the bank was securing the general deposits, and general way of handling the banking business. Probably would tend to show that it is exercise of the power incident to carrying on the business to secure deposits, but I think it would be material, competent evidence.

THE COURT: You can ask him in general terms as to whether the bank put up security in connection with other deposits. I will permit that question to be asked. I even question the materiality of that. I will permit that question to be asked. It would not change the legal effect of it, in the opinion of the Court.

Q Was it the custom of the bank to secure deposits?

A Yes. sir.

The railway company's account was beneficial to the bank.

ON RECROSS EXAMINATION:

The bank furnished surety company bonds to secure deposits. We guaranteed deposits by surety bonds. I would imagine the bank had between 6,000 and 7,000 depositors. Out of those 6,000 or 7,000 deposits there were maybe six or eight or ten deposits secured by a surety bond at any one time, excluding the Government and such accounts as that. It was the custom of the bank to give security to a few of the corporations, six or eight or ten. I think that a great many of the corporations insisted on it, and some paid the premiums themselves, and others we paid the premiums on, but those that paid the premiums would exceed that six or eight or ten I mentioned. Those instruments were in the form of surety bonds. It was not a pledge of the assets of the bank. As far as I can remember this is the only case where a private account was secured by pledging the asset.

(Witness excused).

Complainant introduced in evidence the deposition of

JOHN L. LANCASTER,

taken before Houston Wood, a Notary Public in and for Dallas County, Texas, on May 13th, 1932, said witness testifying in answer to direct interrogatories as follows:

My name is John L. Lancaster; residence, Dallas, Texas. I am President of The Texas and Pacific Railway Company.

I was President of The Texas and Pacific Railway Company from May, 1917, to July, 1918, and have been

President of that company continuously from December, 1919, to the present date.

I came to The Texas and Pacific Railway in March, 1915, as Assistant to the First Vice-President, and served in that capacity until March, 1916. In that month I succeeded to the First Vice-Presidency and remained in that position until May, 1917, when I became President. I was appointed one of the receivers of The Texas and Pacific Railway by the United States District Court for the Western District of Louisiana, Monroe Division, in October, 1916, and acted as such receiver until July, 1918, and from December, 1919, to May 14, 1924, and during this last period Mr. Charles L. Wallace acted as my co-receiver of the property. In addition to this service for the period July, 1918, to December, 1919, I was Federal Manager of a group of railroads in the Southwestern Region including The Texas and Pacific Railway. For the past sixteen years I have been in responsible charge of the management and operation of The Texas and Pacific Railway Company and its subsidiary lines.

I, together with my co-receiver, petitioned the United States District Court for the Western District of Louisiana, Monroe Division, for an order authorizing us to select The First National Bank of El Paso as a depository for receivership funds. Mr. Wallace and I, by our counsel, Mr. Thomas J. Freeman, on or about the 3rd day of July, 1922, filed a petition in the United States District Court for the Western District of Louisiana, Monroe Division, requesting the Court to designate The First National Bank of El Paso as an additional depository of the funds handled by us as receivers of The Texas and Pacific Railway, and the Court on that date entered an order authorizing us, as such receivers, to select The First National Bank of El Paso as an additional depository of such receivership funds, directing

that said bank should furnish us with a bond, with good and solvent sureties—either corporate or individual—in an amount substantially equal to the estimated average daily balances to be carried by us as such receivers in that bank. I am attaching hereto a true and correct copy of the petition and order referred to, marked "Exhibit 1".

(The document in question is the document attached to the agreed statement of facts, marked Exhibit B, and reference is here made to same in the agreed statement of fact).

I advised the President of The First National Bank of El Paso that when the bank furnished us with an acceptable corporate surety bond as provided in the order of the Court, and in the amount of $25,000.00, we would open an account with that bank and would maintain an average daily deposit therein substantially in the amount of said bond. On or about July 10, 1922, The First National Bank of El Paso, as principal, and National Surety Company, as surety, executed and delivered to Mr. Wallace and me, as receivers of The Texas and Pacific Railway Company, a surety bond in the sum of $25,000.00, conditioned as required by said Court order and payable to us as such receivers. This surety bond was acceptable to us, and upon its receipt we opened an account with The First National Bank of El Paso and made deposits therein approximately in the amount of said surety bond.

The original corporate surety bond to which I referred was returned to the surety company at the close of the receivership of The Texas and Pacific Railway and I do not have a complete copy of that bond. However, I am attaching hereto a true and correct copy of the form of said surety company bond which was executed on or

about July 10, 1922, by The First National Bank of El Paso, as principal, and the National Surety Company, as surety in the amount of $25,000.00, payable to J. L. Lancaster and Charles L. Wallace as receivers of the Texas and Pacific Railway, as above stated.

(This document is the same as the one included in the agreed statement of facts, marked "Exhibit C", and reference is made to same in the agreed statement of facts).

The receivership of The Texas and Pacific Railway in the United States District Court for the Western District of Louisiana, Monroe Division, was terminated on May 14, 1924.

Since the termination of said receivership, I have held the position of President of The Texas and Pacific Railway Company.

When said receivership was terminated on May 14, 1924, the receivers had on deposit with The First National Bank of El Paso approximately $25,000.00 which was secured by the surety bond which I have described. Upon the termination of the receivership this account in the name of the receivers was placed in the name of The Texas and Pacific Railway Company and The First National Bank of El Paso was notified immediately to furnish The Texas and Pacific Railway Company with a new corporate surety bond in the sum of $25,000.00 to secure its said deposits.

On or about August 7, 1924, The First National Bank of El Paso, as principal, and National Surety Company, as surety, executed and delivered to The Texas and Pacific Railway Company a surety bond in the sum of $25,000.00 to secure its said deposits, and the old surety bond payable to the receivers was then cancelled.

The Texas and Pacific Railway Company continued its account with and thereafter made deposits in The First

National Bank of El Paso, its average daily deposit balance substantially equalling the amount of the new surety bond until about the month of April, 1927, when the average daily deposit balance in that bank increased to a sum considerably in excess of $25,000.00. Because of that increase, The First National Bank of El Paso was notified to furnish The Texas and Pacific Railway Company with a new corporate surety bond in the sum of $50,000.00, in lieu of the then outstanding surety bond in the sum of $25,000.00, to secure its said deposits. Instead of furnishing a bond in the sum of $50,000.00, The First National Bank of El Paso, as principal, and Maryland Casualty Company, as surety, on or about April 25, 1927, executed and delivered to The Texas and Pacific Railway Company an additional surety bond in the sum of $25,000.00, thereby increasing the total amount of such security to $50,000.00.

Both of these surety bonds, payable to The Texas and Pacific Railway Company, remained in full force and effect from the respective dates of their execution until and after January 29, 1931, and during that period The Texas and Pacific Railway Company kept an account with and made deposits in The First National Bank of El Paso, its average daily deposit balance substantially equalling the aggregate amount of said bonds.

I am attaching hereto a true and correct copy of each of the surety bonds, payable to The Texas and Pacific Railway Company, to which I have referred.

(The two documents are the same as shown in the agreed statement of facts, marked "Exhibit D" and "Exhibit E," and reference is here made to same in the agreed statement of facts).

During the month of January, 1931, Mr. J. E. Benton, Vice-President of The First National Bank of El Paso,

came to see me in Dallas about The Texas and Pacific Railway Company's account and deposits in that bank and the security for the same.

Mr. Benton stated to me that the officers of The First National Bank of El Paso, including its President, Mr. F. M. Murchison, desired The Texas and Pacific Railway Company to accept as security for its deposits at that time, and as security for its future deposits, United States Government Liberty Loan Bonds of the par value of $50,000.00, in lieu of the then outstanding corporate surety bonds payable to The Texas Pacific Railway Company which were then fully protecting and securing its deposits in that bank. In explanation of this request, Mr. Benton stated that the bank had been required by the railway company to furnish it with corporate surety bonds to secure its deposits, the premiums on which were very expensive and a burden on the bank, and they asked that I agree to the substitution of the liberty bonds in lieu of the surety bonds in order to relieve the bank of those heavy premium payments. I told Mr. Benton that it was the policy of The Texas and Pacific Railway Company to require ample and adequate security for its deposits, preferably corporate surety bonds, that under no circumstances would I continue The Texas and Pacific Railway Company's account with and deposits in The First National Bank of El Paso without full and adequate security, and if the then outstanding corporate surety bonds were cancelled without the substitution of other security acceptable to the railway company, its account with said bank would be closed and its deposits withdrawn, but if the substitution of liberty bonds which he proposed would afford The Texas and Pacific Railway Company the same security as the then outstanding corporate surety bonds, I would agree to such substitution solely for the purpose of enabling the bank to save the

premiums on said corporate surety bonds. Mr. Benton stated to me that the liberty bonds would protect The Texas and Pacific Railway Company's deposits as fully as they were protected at that time by the corporate surety bonds, and, believing and relying upon his representations, I told him to have the officers of the bank and the bank's attorneys prepare an agreement which would secure The Texas and Pacific Railway Company's deposits as fully as the then outstanding corporate surety bonds and upon receipt of such instrument we would agree to the cancellation of those surety bonds. Mr. Benton took his departure stating that he would attend to the matter accordingly and at once.

On the 31st day of January, 1931, I received from Mr. Benton an instrument in writing which he stated had been prepared by the attorneys for The First National Bank of El Paso, and which was executed by that bank on the 29th day of January, 1931, by F. M. Murchison, its President, and J. E. Benton, its Cashier, which instrument recited:

"For the purpose of securing the said Texas & Pacific Railway Company against any loss that might possibly occur by reason of its continuance and maintenance of the said deposit, The First National Bank of El Paso has on this date deposited in its Trust Department, and with its Trust officer, which fact is evidenced by the signed statement to that effect of the said Trust Officer hereto attached, United States Government Liberty Bonds of the par value of Fifty Thousand ($50,000.00) Dollars, to be held by the said Trust Department, through its Trust Officer, in trust for the use and benefit of the said Texas & Pacific Railway Company. This is for the purpose of protecting it against loss as aforesaid, and it is agreed that the said Bonds shall, at all times, remain in the Trust Department as such security."

Upon the further representation of Mr. Benton that the bank's attorneys had carefully considered the substitution agreement, had pronounced it legal and valid in every particular and that it was a binding and enforceable obligation against The First National Bank of El Paso, and protected the Texas and Pacific's deposits in said bank as fully as said outstanding surety bonds, and believing those representations to be true, I accepted said liberty bonds, which had been placed in the hands of Mr. H. W. Moore, Trust Officer of said bank, in accordance with the terms of the agreement, in lieu of the then outstanding corporate surety bonds which were then protecting the deposits of The Texas and Pacific Railway Company in that bank, and relying upon said liberty bonds as security for said deposits I caused said surety bonds to be cancelled as of January 30, 1931. After such substitution had been effected, The Texas Pacific Railway Company continued its account with and its deposits in The First National Bank of El Paso, its average daily deposit balance substantially equalling the total par value of said liberty bonds.

I am attaching hereto as my answer to this interrogatory a true and correct copy of said written instrument executed by The First National Bank of El Paso.

(The document is the same document marked "Exhibit F" attached to and forming part of the agreed statement of facts, and reference is here made to same in the agreed statement of facts herein).

On September 4, 1931, The First National Bank of El Paso owed The Texas Pacific Railway Company the sum of Fifty-four thousand, Six Hundred Forty-six and 94/100 Dollars. Possibly there is a small amount of interest included but I do not know the amount.

S. O. POTTORFF,

a witness for Complainant, being first duly sworn, testified as follows:

ON DIRECT EXAMINATION:

I am the Receiver of The First National Bank here in El Paso.

There were no examinations made by the bank examiners of the condition of the bank from the 29th day of January, 1931, until August 6, 1931. There was one examination made between the 29th of January, 1931, and September 6th, 1931. That examination began at 8:00 o'clock in the morning, August 6th, and ended at noon on August 20th. The examiner was Jacob Embry. I don't know the names of his assistants. I think Mr. Collier was here, in charge, although I was not here. His name does not appear on the report. I do not know the number of examiners that were present, and the report does not show it. There was one examiner, and he had some assistants.

With reference to what the report shows with reference to The Texas and Pacific Railway Company's account in the bank being secured, the line across the report under the caption of Bonds and Securities, which lists all the bonds and securities owned by the bank, both pledged and unpledged, there is one line extending across the page showing where there were $50,000.00 of Liberty Bonds — that line says $50,000.00, 4-4¼ Liberty Loan Bonds, 33-38, $50,000.00, estimated market value $52,339.55. The first $50,000.00 that I mentioned is under the caption, under the column headed, entire number of shares of stock or value of bonds and state whether or not stocks or bonds. The second column is headed, name and issuing corporation, character of mortgage, rate, maturity. Under the second column is 4-4¼ Liberty Loan

Bonds. That is abbreviated, L. L. B., 33-38. That means date of maturity, 1933 to 1938; optionally in 1933, mature in 1938. Third column, amount at which carried on books, $50,000.00. Fourth column, estimated market value, $52-339.55. Of course Liberty Bonds have daily quotations, fluctuate. Last column, indicate whether taken for D. P. C., abbreviation for debt previously contracted, and where interest or dividend is not paid, and indicate those loaned or pledged, and if any borrowed so state, are not any valuable security charged off. See note below. In that column appears, secure T. & P. Railway deposit.

This report shows that The Texas and Pacific deposit on that date was secured by Liberty Bonds of the par value of $50,000.00, and also shows the market value at a greater amount.

I never was a bank examiner. When I take charge of a bank it is past its days of being examined. When I take a bank all of its examinations have been made. I just see the results of the examination, filed copies of the reports. I am never in attendance at an examination because I get there after it is done. I am more or less familiar with what an examiner does from the reports. I could not tell the day the examiners made examination of the securities of this railway; very likely was the first day the examination started, because the first thing the examiners do when they come is verify the cash and check up the securities. After they balance and check over the cash and securities they generally go into the loans owned by the bank, whether pledged or unpledged. Bearing in mind I have never examined a bank, ordinarily one of the first things is to balance the cash, as I understand it; the next thing is to see all securities are in their proper place.

Q And if they are not in the proper place they report that to the Comptroller?

A The report goes on the regular form here, just as it is there, reflecting the bank's books, what the bank's books show. An examiner may make a special report by letter on something that requires that sort of a report.

Q If the bank had made some irregular transaction, and that fact is shown by its books, and the examiner had discovered such transaction, would it have been his duty to have reported that to the Comptroller immediately, or would he wait until he made out his regular report?

COUNSEL FOR DEFENDANT: He is calling for the conclusion of the witness as to what the bank examiner would do, whether he would send an immediate report or let it be reflected in his report.

THE COURT: The Court sustains the objection.

COUNSEL FOR COMPLAINANT: We except.

I have the ledger sheet of The Texas and Pacific Railway Company. I have it here from December 5, 1930, on down to the close of the bank.

The balance of The Texas and Pacific Railway Company on deposit at The First National Bank on January 29, 1931, was $22,264.10, as reflected by the ledger sheet. I have just been handed this list. I have not had an opportunity to check it over, but I assume it is correct. Including January 29, 1931, to August 5, 1931, inclusive, total of all deposits in that period are $132,220.27. The total deposits from August 6, 1931, to September 3, 1931, inclusive, were $16,545.48. The balance at close of business on August 6, 1931, was $50,428.10. At close of business on September 3, 1931, the balance was $54,325.90. The balance they had to start with, plus the deposits, minus the checks, would give the balance they had when the bank closed.

I have not read the agreed statement of facts in this case, but the balance was $54,325.90 at the close of business September 3rd. We added after the bank closed, for the purpose of allowing claim we added interest accrued up to the time, $30.84, and gave the claim for $54,356.74.

COUNSEL FOR COMPLAINANT: I believe there was one check for something like $310.00 that brought it up to the total as shown in the statement of facts.

COUNSEL FOR DEFENDANT: $54,646.94.

The list of Daily deposits referred to by the witness was introduced in evidence by Complainant, same was marked "C-2", and is as follows:

C-2

	132,220.27 s
8-6	30.00
	315.51
	356.30
8-7	198.79
	277.53
8-8	15.45
	450.00
	89.15
	230.20
8-10	613.15
	355.00
8-11	20.56
	165.00
	1,647.85
8-12	312.00
	128.80
8-13	148.95

	173.48
	60.00
8-14	155.53
	546.13
8-15	50.16
	865.39
	74.85
8-17	21.00
	868.35
	636.75
8-18	313.70
	292.23
8-19	238.47
	141.41
8-20	205.85
	277.00
8-21	151.61
	194.70
8-22	30.00
	40.00
	106.29
8-24	309.03
	290.00
8-25	224.75
	184.47
	90.00
8-26	210.12
	168.34
	490.00
	224.78
8-27	17.00
	216.00
	197.02
	125.00
8-28	228.09

	291.20
	175.00
8-29	516.72
	189.60
8-30	20.00
Int	88.92
8-31	307.42
	338.85
9-1	5.13
	99.44
	125.94
	100.00
9-2	33.65
	70.68
	30.00
9-3	75.39
	305.80

ON CROSS EXAMINATION:

This report of the examination made in August, 1931, was not sent in to the Comptroller of the Currency until after the bank closed. I know that of my own knowledge.

I have already allowed the claim of The Texas and Pacific Railway Company as an unsecured claim. I have a check, and have advised them they can have it at any time they want it, and they apparently don't want it; they haven't got it yet. Claim has been allowed and the check issued, the Receiver's check issued ready for delivery.

ON REDIRECT EXAMINATION:

Q That check may be delivered without prejudice to any rights claimed here by the plaintiff?

A We deliver the check in the usual manner as a dividend on a claim.

(Witness excused).

THE COMPLAINANT RESTED
THE DEFENDANT OFFERED NO TESTIMONY.

Argument of counsel for the respective parties was thereupon presented to the Court, and continued until 5:00 o'clock P. M., at which time Court recessed until 10:00 o'clock A. M. Thursday, May 26, 1932, and argument resumed; at the conclusion of which argument the Court found in favor of the Defendant and against the Complainant in said cause; also overruled motion to dismiss interposed by the defendant to the action of the complainant herein; and also overruled motion to strike of the Complainant on the cross action of the Defendant.

To which action of the Court in overruling Complainant's motion to strike or dismiss the cross bill of Defendant, and to the action of the Court in finding in favor of the Defendant and against Complainant herein, the Complainant then and there in open Court excepted.

BE IT FURTHER REMEMBERED, That on June 21, 1932, the Court made and filed Findings of Fact and Conclusions of Law as follows:

(Style and number of the case omitted).

FINDINGS OF FACT.

I

The Court adopts as paragraph I of the Findings of Fact in this case the Agreed Statement of Facts executed by the respective parties to this suit filed in this case on the 25th day of May, 1932; and the Court finds that the facts to be as stated in said Agreed Statement of Facts.

II

(a) The deposits of The Texas and Pacific Railway Company in The First National Bank of El Paso, prior to January 29, 1931, were fully protected and the repayment thereof by said bank to said railway company was fully guaranteed by two corporate surety bonds aggregating $50,000.00, to-wit: the first surety bond in the sum of $25,000.00 executed on August 7, 1924, by The First National Bank of El Paso, as principal, and the National Surety Company, as surety; and the second surety bond in the sum of $25,000.00 executed on April 25, 1927, by The First National Bank of El Paso, as principal, and Maryland Casualty Company, as surety. A copy of each of said surety bonds is attached to and made a part of the Agreed Statement of Facts adopted by the Court as Paragraph I hereof.

(b) During the month of January, 1931, and prior to the 29th day thereof, while said corporate surety bonds were in full force and effect, and while The First National Bank of El Paso was solvent and a going concern, the duly authorized active Vice President-Cashier of said bank called upon the President of The Texas and Pacific Railway Company at Dallas, Texas, and requested said railway officials to accept as security for The Texas and Pacific Railway Company's then deposits, and all future deposits or moneys to its credit in said bank, United States Government Liberty Loan Bonds of the par value of $50,000.00 in lieu of said corporate surety bonds. In explanation of this request said bank officer represented to said railway president that the First National Bank of El Paso had been required by The Texas and Pacific Railway to furnish it corporate surety bonds to secure its deposits in said bank, that the premiums on said bonds which had been paid by the bank were expensive and a

burden upon it and that The First National Bank of El Paso desired The Texas and Pacific Railway Company to accept said Liberty Bonds in lieu of said corporate surety bonds in order to relieve the bank from said premium payments.

(c) The president of the Texas and Pacific Railway Company advised said Vice President-Cashier of The First National Bank of El Paso that it was the policy of the railway company to require its depositories to provide ample and adequate security for its deposits, preferably corporate surety bonds; that under no circumstances would The Texas and Pacific Railway Company continue its account with and deposits in The First National Bank of El Paso without full and adequate security; that if the then outstanding corporate surety bonds were cancelled without the substitution of other adequate security acceptable to the railway company its account with said bank would be closed and its deposits withdrawn; but if the substitution of said liberty bonds, as proposed, would afford The Texas and Pacific Railway Company the same security as the then outstanding corporate surety bonds, said railway company would agree to such substitution solely for the purpose of enabling The First National Bank of El Paso to save the premiums on said corporate surety bonds.

(d) The said Vice President-Cashier of The First National Bank of El Paso advised the said president of The Texas and Pacific Railway Company that said liberty bonds, if and when substituted for said corporate surety bonds, would protect said railway company's deposits in said bank as fully and to the same extent as they were then protected by said corporate surety bonds and agreed to submit the proposed substitution plan to the attorneys for said bank for their investigation and ap-

proval. Said railway president, believing and relying upon said representations of said bank official, requested said Vice President-Cashier to have the officers and attorneys for said bank carefully investigate the proposed plan; and said railway president stated to said bank official that if, after such investigation, said bank officers and attorneys concluded that such substitution of liberty bonds in lieu of said corporate surety bonds would be legal and valid in every particular, would constitute and be a binding and enforceable obligation against said bank and would protect the railway company's deposits in said bank as fully and to the same extent as the then outstanding corporate surety bonds, The Texas and Pacific Railway Company would agree to such substitution and to the cancellation of said corporate surety bonds.

(e) The said Vice President-Cashier of The First National Bank of El Paso thereafter submitted the proposed substitution plan to the attorneys for said bank, and said attorneys, after investigating the same, advised the officers of said bank that such substitution could be legally made, would constitute and be in every respect a binding and enforceable obligation against The First National Bank of El Paso, and that said liberty bonds, if and when substituted for said corporate surety bonds would protect the deposits of The Texas and Pacific Railway Company as fully and to the same extent as said corporate surety bonds. At the request of the officers of said bank, the attorneys for the bank prepared the pledge agreement which was executed on January 29, 1931, in good faith, by The First National Bank of El Paso, acting by and through F. M. Murchison, its president and J. E. Benton, its cashier. Thereupon the liberty bonds enumerated in the Agreed Statement of Facts, adopted by the Court in paragraph I hereof (the par value of which aggregated $50,000.00), were placed in the Trust Department and

with the Trust Officer of The First National Bank of El Paso and in a separate envelope bearing the name of The Texas and Pacific Railway Company, to be held by said Trust Office separate and apart from all other securities of said bank in accordance with the terms of said pledge agreement. Said liberty bonds were thereafter and now are held separate and apart from all other securities of said bank and the liberty bonds for which plaintiff now sues are the identical liberty bonds which were placed in the hands of said Trust Officer on January 29, 1931. A full record of this transaction was made on the books of said bank on January 29, 1931, and said books ever since that date have reflected the same.

(f) The Vice President-Cashier of The First National Bank of El Paso sent the executed pledge agreement to the president of The Texas and Pacific Railway Company at Dallas, Texas, and advised said railway official that the officers and attorneys for said bank after carefully investigating the proposed substitution plan had concluded that the same would be in every respect a legal and binding obligation against said bank, that said executed pledge agreement had been prepared by the attorneys for the bank, and that the officers and attorneys for said bank were of the opinion and had declared that said executed pledge agreement and said liberty bonds, if and when substituted for said corporate surety bonds, would protect the deposits of The Texas and Pacific Railway Company in The First National Bank of El Paso as fully and to the same extent as said corporate surety bonds. Believing said representations of said bank official to be true, said railway president accepted said executed pledge agreement and said liberty bonds which had been placed in the custody of said Trust Officer of said bank in lieu of the then outstanding corporate surety bonds

and caused the latter to be cancelled as of January 30, 1931.

III

(a) After said liberty bonds had been substituted for said corporate surety bonds, The Texas and Pacific Railway Company, relying upon said pledge agreement and liberty bonds as security for its deposits, continued its account with and made deposits in The First National Bank of El Paso, and thereafter its average daily deposit balance in said bank substantially equalled the total par value of said liberty bonds.

(b) The Texas and Pacific Railway Company had on deposit with or to its credit in The First National Bank of El Paso on the following dates the sums shown below, to wit:

January 29, 1931	$22,264.10
August 6, 1931	50,428.10
September 3, 1931	54,646.94

(c) The Texas and Pacific Railway Company deposited in the First National Bank of El Paso from January 29, 1931, to August 5, 1931, inclusive, the total sum of $132,220.27.

(d) The Texas and Pacific Railway Company deposited in the First National Bank of El Paso from August 6, 1931, to September 3, 1931, inclusive, the total sum of $16,545.48.

(e) The total amount of $54,646.94 on deposit with or to the credit of The Texas and Pacific Railway Company in the First National Bank of El Paso on September 3, 1931, was moneys deposited by said railway company in said bank, subsequent to January 29, 1931, and/or accrued interest thereon, but said report was not

forwarded to the Comptroller's office until after the bank closed.

IV

(a) By substituting said liberty bonds as security for The Texas and Pacific Railway Company's deposits in lieu of said corporate surety bonds, The First National Bank of El Paso saved the premiums on said surety bonds, earned 4¼% interest on said liberty bonds and was able to hold the railway company's account which would have been closed had said corporate surety bonds been cancelled without other adequate security being furnished said railway company by said bank.

(b) The First National Bank of El Paso over a long period of years has furnished corporate surety bonds to protect the deposits of numerous private depositors.

(c) This was the first time the First National Bank had pledged its assets to secure a private deposit.

V

The Receiver of The First National Bank of El Paso has allowed as a general claim only the claim of The Texas and Pacific Railway Company as a secured depositor for the sum of $54,646.94 and has tendered to said railway company a first dividend check in the sum of $16,394.08, being 30% of the full amount of its claim.

VI

(a) The National Bank Examiners acting under the supervision and control of the Comptroller of the Currency made an examination of The First National Bank of El Paso commencing at 8 o'clock a. m. on August 6, 1931, and ending at noon on August 20, 1931, the report of said bank examiners to the Comptroller covering the

condition of said bank showed that liberty bonds of the par value of $50,000.00, were then pledged to secure the deposit of The Texas and Pacific Railway Company. This information was obtained from the books of the bank probably during the first two or three days of the examination.

(b) The officers of the First National Bank of El Paso were never notified or advised by either the bank examiners of the Comptroller of the Currency that the pledge of liberty bonds to secure the deposits of The Texas and Pacific Railway Company was either irregular, beyond the powers of the bank, or illegal, and no complaint of any character concerning the substitution agreement and the pledge of said liberty bonds was ever made to the officers of said bank or any of them by said bank examiners and/or the Comptroller of the Currency.

(Signed) CHARLES A. BOYNTON,
Judge.

O. K. T. HARDIE.
O. K. DEL W. HARRINGTON.
S. N. RUSSELL.

FILED June 21, 1932 (El Paso Division) D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, by Flora L. Linker, Deputy Clerk.

(Style and number of case omitted).

CONCLUSIONS OF LAW.

I.

National banks in the United States have never had and do not now have express or implied power to pledge their assets to secure the payment of private deposits.

II.

The attempted pledge in this case of the Liberty bonds described in the Amended Bill of Complaint was one designed to secure the payment of a private deposit, and was and is wholly void, and of no effect.

III.

The attempted pledge of the securities in this case being void and contrary to law, and the public policy of the United States, the Plaintiff has never had and does not now have any valid liens or claims to, or rights in, the Liberty Bonds described in Plaintiff's Amended Bill of Complaint, and the Receiver is not estopped from asserting the invalidity of the attempted pledge of the bonds.

IV.

The Plaintiff has only an ordinary unsecured claim against the Receiver for the sum of $54,646.94, which claim has been already allowed by the Receiver, and upon which claim the Receiver has already offered to pay the regular dividends payable to ordinary depositors, and Plaintiff is therefore not entitled to any relief herein.

V.

The Defendant is entitled to have the pledge contract described in the amended Bill of Complaint declared invalid and of no effect, and to have Defendant's title to said bonds adjudged valid and free of all liens asserted by Plaintiff, and to have the cloud cast on Defendant's title to said Liberty Bonds by reason of Plaintiff's claims removed.

(Signed) CHARLES A. BOYNTON,
Judge.

FILED June 21, 1932, (El Paso Division), D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, by Flora L. Linker, Deputy Clerk.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court entered Judgment in favor of Defendant herein; to which action of the Court the Complainant excepted.

Complainant filed exceptions to Conclusions of Law, as follows:

(Style and number of the case omitted).

PLAINTIFF'S EXCEPTIONS TO CONCLUSIONS OF LAW.

Comes now the plaintiff in the above numbered and entitled cause, counsel for defendant having submitted to counsel for plaintiff proposed conclusions of law to be submitted to the Court, and objects and excepts to such conclusions as so proposed, as follows:

(1) Plaintiff excepts to the conclusions of law as set out in Paragraph I and especially to that part thereof which holds "national banks in the United States have never had and do not now have express or implied power to pledge their assets to secure the payment of private deposits," because such finding is contrary to the plain terms of the statute granting the power to national banks to make contracts and to receive deposits.

(2) Plaintiff excepts to the conclusions of law as stated in Paragraph II to the effect that the pledge in this case of the liberty bonds described in the amended bill of complaint was and is wholly void and of no effect, because there is no law of the United States, stat-

utory or otherwise, prohibing national banks from making and entering into and performing the pledge agreement involved in this case.

(3) Plaintiff objects and excepts to Paragraph III of the conclusions of law, to the effect that plaintiff has never had and does not now have any valid liens or claims to, or rights in the liberty bonds described in plaintiff's amended bill of complaint, which conclusion is based upon the theory that the pledge agreement is void and contrary to law, because there is no law of the United States prohibiting the making, executing and performing of such pledge agreement or declaring the same void.

(4) Plaintiff excepts to the conclusion in Paragraph III, to the effect that plaintiff has never had and does not now have any valid lien, claim to or rights in the liberty bonds involved in this case, which conclusion is based upon the theory that said pledge agreement is contrary to the public policy of the United States, because there is no statutory declaration of the United States, and there is no decision of the Supreme Court of the United States nor or any Circuit Court of Appeals of the United States declaring such pledge agreement to be against the public policy of the United States.

(5) Plaintiff objects and excepts to the conclusions in Paragraph IV thereof, to the effect that plaintiff has only an ordinary unsecured claim against the Receiver for the sum of $54,646.94, because under the plain provisions of the pledge agreement, and the circumstances and conditions under which such money was deposited with and received by The First National Bank of El Paso, and the liberty bonds described in plaintiff's complaint placed in trust by said bank for plaintiff's use and benefit in the event said bank should fail to repay

to plaintiff the full amount of such deposit on demand, a valid lien was thereby created and now exists in plaintiff's favor on and against said liberty bonds to secure its said deposit; there being no law forbidding such agreement, plaintiff is entitled, at its option, either to the possession of said bonds or to have said lien foreclosed and said bonds sold and the proceeds arising from such sale, or so much thereof as may be necessary, applied to the extinguishment of plaintiff's said claim against defendant.

(6) Plaintiff further objects to the conclusions in Paragraph IV to the effect that plaintiff has only an ordinary unsecured claim against the Receiver for the sum of $54,646.94, because if it should be held that plaintiff is not entitled to the possession of said bonds or to the proceeds arising from the sale thereof, then under the provisions of said pledge agreement and the conditions under which such money was deposited by plaintiff in said The First National Bank of El Paso and the liberty bonds described in plaintiff's complaint were placed by said bank in trust for plaintiff's use and benefit to secure its said deposit, there being no law forbidding such agreement, plaintiff is entitled to recover the full amount of said deposit as for money had and received.

(7) Plaintiff further objects and excepts to the court's conclusion in said Paragraph IV, for the reason that if the court should be correct in holding the pledge of said liberty bonds void, the defendant cannot retain plaintiff's money deposited by virtue of said pledge contract and at the same time refuse to comply with its terms, and plaintiff is entitled to recover from defendant the full amount of its deposit in said bank at the time its doors were closed on September 4, 1931, with lawful interest thereon as for money had and received.

(8) Plaintiff further excepts to Paragraph IV of said conclusions of law, for the reason that under the circumstances and conditions which plaintiff's deposits were made in said bank, and of which there remains unpaid a balance of $54,646.94, the same became and were special deposits and under such circumstances and conditions plaintiff is entitled to recover the full amount thereof from defendant out of the funds of said bank.

(9) Plaintiff further excepts to Paragraph IV of the court's conclusions of law, for the reason that the pledge agreement under which the liberty bonds in this suit were placed in trust by said The First National Bank of El Paso to secure plaintiff's deposits is a matter of record in said bank, and it being admitted by defendant that the said records were examined by a duly authorized national bank examiner approximately thirty days before said bank was placed in the hands of the defendant as receiver, and that both said bank examiner and the Comptroller of the Currency ascertained and well knew from said examination that plaintiff's deposits in said bank were secured by said liberty bonds, and no complaint having been made to said bank either by such examiner or said Comptroller to the placing of said bonds as such security, both the defendant receiver and the Comptroller of the Currency, whom he represents, were and are estopped from asserting that said pledge is illegal.

(10) Plaintiff excepts to Paragraph V of said conclusions of law, wherein the court holds that defendant's title to said bonds should be adjudged valid and free of all liens asserted by plaintiff, because said pledge agreement is not forbidden by law and was fully executed in good faith by both parties, and said bonds were placed in trust and delivered by said bank to a trustee to be

held by him for the use and benefit of plaintiff and to be delivered by such trustee to plaintiff in the event said First National Bank of El Paso should fail to repay to plaintiff the full amount of its deposit upon demand; that demand having been made for such payment, and payment having been refused, plaintiff is entitled to have such bonds, or so many thereof as may be necessary to pay its said deposit, delivered to it by defendant.

(11) Plaintiff further excepts to Paragraph V of said conclusions of law, for the reason that if the court be correct in concluding that plaintiff is not entitled to the possession of said liberty bonds, that then plaintiff is entitled under said pledge agreement to have such bonds held in trust by defendant for its use and benefit until the full amount of plaintiff's said deposit has been paid to it by defendant.

(Signed) S. N. RUSSELL
D. W. HARRINGTON
M. E. CLIFTON
Attorneys for Plaintiff.

FILED June 21, 1932, (El Paso Division), D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, by Flora L. Linker, Deputy Clerk.

The following order overruling plaintiff's exceptions was entered:

(Style and number of case omitted).

On this the 21st day of June, 1932, came on to be heard plaintiff's exceptions to the Court's conclusions of law in above numbered and entitled cause, said exceptions having been submitted to the Court in connection with the Court's proposed conclusions of law, and which proposed conclusions of law are now finally made by the Court.

And the Court having heard and considered said exceptions, and each and every thereof, and argument of counsel, and being fully advised in the premises, is of the opinion that neither of said exceptions is well taken; and it is therefore ordered that each and every of said exceptions be and the same is in all things hereby overruled.

To which action and ruling of the Court the plaintiff then and there in open court excepted.

(Signed) CHARLES A. BOYNTON
United State's District Judge.

O. K. T. HARDIE
O. K. DEL W. HARRINGTON
S. N. RUSSELL.

FILED June 21, 1932 (El Paso Division), D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, by Flora L. Linker, Deputy Clerk.

SHORTHAND REPORTER'S CERTIFICATE.

* * * *

THE STATE OF TEXAS,
COUNTY OF EL PASO.

I, Roy Lassetter, Shorthand Reporter, hereby certify that the foregoing on 72 pages is a full, true and correct transcript of the evidence and bill of exceptions in the case of The Texas and Pacific Railway Company vs. S. O. Pottorff, Receiver of the First National Bank of El Paso, Texas, No. 251 Equity, El Paso Division of the United States District Court in and for the Western District of Texas.

Witness my hand at El Paso, Texas, this 5th day of July, A. D. 1932.

ROY LASSETTER,
Shorthand Reporter.

AGREEMENT OF COUNSEL.

* * * *

We, the undersigned attorneys of record for the respective parties, hereby agree that the foregoing record on 72 pages is a full, true and correct transcript of evidence and bill of exceptions in the case of The Texas and Pacific Railway Company vs. S. O. Pottorff, Receiver of The First National Bank of El Paso, No. 251 Equity, El Paso Division of the United States District Court in and for the Western District of Texas; and hereby approve the same as the transcript of evidence and bill of exceptions in said case.

Witness our hands this 5th day of July, A. D. 1932.

S. N. RUSSELL,
D. W. HARRINGTON,
M. E. CLINTON,
Attorneys for Complainant.

JONES, GOLDSTEIN, HARDIE & GRAMBLING,
THORNTON HARDIE,
Attorneys for Defendant.

APPROVAL OF THE COURT.

* * * *

The foregoing record having been approved by counsel for the respective parties to this case, and same having been examined and found correct, said record, on 72 pages, numbered from 1 to 72, is hereby approved as the statement of evidence and bill of exceptions in the case of The Texas and Pacific Railway Company vs. S. O. Pottorff, Receiver of The First National Bank of El Paso, Texas, No. 251 Equity, El Paso Division of the United States District Court in and for the Western

District of Texas; and ordered filed as a part of the record in said cause.

Witness my hand at Waco, Texas, this the 7th day of July, A. D. 1932.

CHARLES A. BOYNTON,
United States District Judge.

Filed July 7, 1932. D. H. Hart, Clerk, By T. H. Thompson, Deputy.

Stipulation with Reference to Liberty Bonds.

The parties to the above entitled and numbered cause, with the approval of the court, hereby stipulate as follows:

I

Pending the appeal of this cause and the final adjudication by the courts of the rights of the respective parties herein, the defendant, S. O. Pottorff, Receiver of The First National Bank of El Paso, agrees and obligates himself and his successors to hold those seven (7) certain United States Government Liberty Loan 4¼ Coupon Bonds, 1933-38, of the aggregate par value of $50,000.00, being the same liberty bonds described in the decree of the court entered in this cause and described by numbers as follows:

G00129907	$ 5,000.00
A00115901	5,000.00
E00040105	5,000.00
K00129870	5,000.00
G00353057	10,000.00
H00353058	10,000.00
H00298068	10,000.00

separate and apart from all assets of said bank, unless said liberty bonds are sold pursuant to Paragraph II hereof.

II

Plaintiff, The Texas and Pacific Railway Company, agrees and hereby authorizes said defendant, if he so desires, to sell said liberty bonds for cash for the highest price obtainable, and in no event for less than their par value, and in the event of such sale or sales said defendant hereby agrees and obligates himself and his successors to hold the proceeds therefrom, separate and apart from all assets of said bank expressly subject to and for the purpose of satisfying any and all liens, claims or judgments which the courts may adjudicate that The Texas and Pacific Railway Company has, or to which it may be entitled, in and to said liberty bonds or the proceeds from the sale or sales thereof.

III

Said defendant, S. O. Pottorff, hereby expressly agrees that the Court, in allowing the plaintiff an appeal in this cause, may enter an order suspending and superseding the decree of the Court entered herein on May 26, 1932, upon the plaintiff filing in said cause a bond in the sum of $1,000.00, which shall act both as a supersedeas and a bond for costs and damages on appeal.

IV

This stipulation shall be filed among the papers of this cause and shall constitute and be a part of the record thereof.

In witness whereof the parties hereto have signed this stipulation, by their attorneys, this the 12th day of August, 1932.

S. N. RUSSELL
D. W. HARRINGTON
M. E. CLINTON
Attorneys for Plaintiff.
JONES, GOLDSTEIN, HARDIE &

GRAMBLING
By THORNTON HARDIE
Attorneys for Defendant.

S. O. POTTORFF, Receiver
First National Bank,
El Paso, Texas.

The foregoing agreement is hereby approved this 12th day of August, A. D. 1932.

CHARLES A. BOYNTON,
District Judge.

Filed August 23, 1932 (El Paso Division) D. H. Hart, Clerk, U. S District Court, West. Dist. of Texas, By Flora L. Linker, Deputy Clerk.

Petition for Appeal.

To the Honorable Charles A. Boynton, District Judge:

The above named plaintiff, The Texas and Pacific Railway Company, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 26th day of May, 1932, does hereby appeal from said decree to the Unitetd States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, for the reasons set forth in the Assignment of Errors filed herewith, and prays that its appeal be allowed and that citation be issued as required by law, and that a transcript of record, proceedings and papers upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit under the rules of such court in such cases made and provided.

And your petitioner further prays that the decree of the court should be suspended and superseded, and that the court enter the proper order with reference to the

security to be required to perfect this appeal, and to supersede the judgment of the court.

S. N. RUSSELL
D. W. HARRINGTON
M. E. CLINTON
Attorneys for Plaintiff.

Order Allowing Appeal.

On motion of the plaintiff it is hereby ordered that the appeal of the plaintiff from the judgment of this court to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and other proceedings in this cause be forthwith transmitted to said Circuit Court of Appeals.

It is further ordered that the judgment of the court in this cause be suspended and superseded in accordance with the stipulation of the parties filed herein, upon the plaintiff filing a bond in the penal sum of One Thousand ($1,000.00) Dollars, to be conditioned as provided by law, such bond to act both as a supersedeas and as a bond for costs and damages on appeal.

Done this 23rd day of August, 1932.

CHARLES A. BOYNTON,
District Judge.

Waiver of Citation.

Copy of the above order received, and citation on appeal waived, this 23rd day of August, 1932.

JONES, GOLDSTEIN, HARDIE & GRAMBLING,

By T. HARDIE

Attorneys for Defendant.

Filed, U. S. District Court, Western District of Texas, Aug. 23, 1932. D. H. Hart, Clerk, By J. N. Phillips, Deputy.

Assignment of Errors.

Comes now the Texas and Pacific Railway Company, plaintiff in the above styled and numbered cause, and files the following assignments of error upon which it will rely in the prosecution of its appeal herewith petitioned for in said cause from the decree of this Court entered therein on the 26th day of May, 1932.

I

The trial court erred in overruling and in not granting plaintiff's motion to dismiss defendant's cross-bill.

II

The trial court erred in denying the relief prayed for by plaintiff.

III

The trial court erred in concluding and in holding in paragraph I of its Conclusions of Law that "National banks in the United States have never had and do not now have express or implied power to pledge their assets to secure the payment of private deposits."

IV

The trial court erred in concluding and in holding in paragraph II of its Conclusions of Law that "the pledge of the Liberty Bonds described in the Amended Bill of Complaint was one designed to secure the payment of a private deposit."

V

The trial court erred in concluding in paragraph II of its Conclusions of Law and in decreeing that the pledge in this case of the Liberty Bonds described in the Amended Bill of Complaint was and is wholly void and of no effect.

VI

The trial court erred in concluding and in holding in paragraph III of its Conclusions of Law that the pledge of the securities in this case was and is contrary to law.

VII

The trial court erred in concluding and in holding in paragraph III of its Conclusions of Law that the pledge of the securities in this case was and is contrary to the public policy of the United States.

VIII

The trial court erred in concluding and in holding in paragraph III of its Conclusions of Law that "plaintiff has never had and does not now have any valid liens or claims to, or rights in, the Liberty Bonds described in Plaintiff's Amended Bill of Complaint."

IX

The trial court erred in concluding and in holding in paragraph III of its Conclusions of Law that "The Receiver is not estopped from asserting the invalidity of the attempted pledge of the bonds."

X

The trial court erred in concluding and in holding in paragraph IV of its Conclusions of Law that "Plaintiff has only an ordinary unsecured claim against the Re-

ceiver for the sum of $54,64[illegible]4 * * * , and Plaintiff is therefore not entitled to any relief herein."

XI

The trial court erred in overruling each of plaintiff's exceptions respectively to the court's Conclusions of Law, which exceptions are numbered from I to XI, inclusive.

XII

The trial court erred in concluding and in holding in effect as a matter of law that plaintiff's deposits in The First National Bank of El Paso were general deposits, that they became assets of said bank and as such passed to the defendant Receiver to be distributed by him among the general creditors of said bank.

XIII

The trial court erred in decreeing "that said liberty bonds are the property of the defendant, constituting assets of his trust, to be administered by him for the benefit of the general creditors of The First National Bank of El Paso."

XIV

The trial court erred in concluding and in holding, in effect, as a matter of law that plaintiff's deposits in The First National Bank of El Paso were not, or did not become, and are not now special deposits, the title to which remained and now is in plaintiff, and that they are not now held by said Receiver in trust for the use and benefit of The Texas and Pacific Railway Company.

XV

The trial court erred in concluding and in holding, in effect, as a matter of law, that the payment by defendant Receiver to plaintiff of the full amount of its claim

would constitute and be an unlawful preference prohibited by the national banking act.

XVI

The trial court erred in concluding and in holding, in effect, as a matter of law, that plaintiff is not entitled to recover of and from said Receiver, as for money had and received, the full amount of its deposits in The First National Bank of El Paso, and lawful interest thereon from the 4th day of September, 1931, until paid.

XVII

The trial court erred in concluding and in holding, in effect, as a matter of law that the knowledge of the bank examiners of said pledge agreement was not the knowledge of the Comptroller of the Currency and that said Comptroller had no notice, actual or constructive, of said pledge agreement until after said bank had closed its doors.

XVIII

The trial court erred in concluding and in holding, in effect, as a matter of law that the defendant Receiver is not estopped from asserting that plaintiff is not entitled to a lien upon said liberty bonds or to a lien upon the funds in the possession of said Receiver.

XIX

The trial court erred in concluding and in holding, in effect, as a matter of law, that the national bank examiners, who examined The First National Bank of El Paso early in August, 1931, and who discovered on the books of said bank the record of the pledge agreement, were under no legal obligation, if said pledge agreement was irregular and unlawful, to demand of the officers of said bank the cancellation of said pledge agreement; and

that said bank examiners were under no legal obligation to immediately notify the Comptroller of the Currency of the alleged irregular and unlawful pledge without waiting to complete and mail their final report of such examination to said Comptroller.

XX

The trial court erred in decreeing "that any cloud existing on defendant's title to said liberty bonds by reason of the above mentioned (pledge) contract, and by reason of the assertion of any claims to said bonds by plaintiff be, and the same is hereby removed."

XXI

The trial court erred in decreeing "that the plaintiff, The Texas and Pacific Railway Company, is not entitled to have or recover any relief herein against the defendant, S. O. Pottorff, Receiver of The First National Bank of El Paso, Texas," and in further decreeing "that Plaintiff, The Texas and Pacific Railway Company, take nothing by this suit."

XXII

The trial court erred in decreeing "that as to plaintiff's suit the defendant recover of and from plaintiff all costs in this behalf incurred."

XXIII

The trial court erred in decreeing "That the plaintiff, The Texas and Pacific Railway Company, desist from asserting any further rights or claims in said liberty bonds."

XXIV

The trial court erred in concluding and in holding in effect as a matter of law that the failure of the vice-

president-cashier of The First National Bank of El Paso to advise the president of The Texas and Pacific Railway Company that the Maryland Casualty Company had notified the officers of the bank that said surety company was going off all surety bonds was not constructive fraud or a fraud in law upon the railway company under the facts of this case.

WHEREFORE, plaintiff presents these assignments of error with its petition for allowance of appeal herein, and prays for citation as provided by law, and that the decree of the trial court be reversed, and for such other and further relief as to the Court may seem just and proper.

S. N. RUSSELL
D. W. HARRINGTON
M. E. CLINTON
Attorneys for Plaintiff, The Texas and Pacific Railway Company.

Filed, U. S. District Court, Western District of Texas, Aug. 23, 1932, D. H. Hart, Clerk, By J. N. Phillips, Deputy Clerk.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS, That we, The Texas and Pacific Railway Company, as principal, and the other signers hereto as sureties, are held and firmly bound unto S. O. Pottorff, Receiver of The First National Bank of El Paso, Texas, in the full and just sum of One Thousand ($1,000.00) Dollars, to be paid to the said S. O. Pottorff, Receiver, and his successors, to which payment well and truly to be made we bind ourselves, our assigns, successors, heirs, executors and administrators, jointly and severally by these presents:

The condition of this bond is such, however, that WHEREAS at the April 1932 Term of the above court, in a suit pending in said court between the above named plaintiff and defendant, a judgment was rendered against the plaintiff in favor of the defendant, and said The Texas and Pacific Railway Company has appealed from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit in an effort to reverse and set aside the judgment of the court rendered in this cause.

NOW THEREFORE, if said The Texas and Pacific Railway Company shall prosecute its said appeal to effect, and pay and satisfy all damages and costs if it shall fail to prevail in its appeal, then this obligation shall be void, otherwise to remain in full force and effect.

Executed this 23rd day of August, 1932.

THE TEXAS AND PACIFIC RAIL-
RAILWAY COMPANY,
Principal,
By S. N. RUSSELL,
Its Attorney of Record.

R. W. McAFEE
C. N. BASSETT
Sureties.

The sureties on the foregoing bond are considered sufficient thereto by me.

J. N. PHILLIPS,
Deputy Clerk.

The within bond is hereby approved both as to its sufficiency and as to its form, this 23rd day of August, 1932.

CHARLES A. BOYNTON,
District Judge.

Notice of filing of the foregoing bond is hereby waived.

JONES, GOLDSTEIN, HARDIE &
GRAMBLING,
By T. HARDIE
Attorneys for S. O. Pottorff,
Receiver.

Filed, U. S. District Court, Western District of Texas, Aug. 23, 1932, D. H. Hart, Clerk, By J. N. Phillips, Deputy Clerk.

Bill of Costs.

CLERK'S FEES, ETC.

Instituting suit	$ 5.00
Filing Defendant's Motion to Dismiss	5.00
Filing and entering Judgment	5.00
Filing Petition for Appeal	5.00
Comparing, indexing and certifying printed Transcript of Record	24.50
Cost of printing record	122.00

MARSHAL'S FEES

Serving original subpoena	2.00

REPORTER'S FEE

Per diems	20.00

NOTARY'S FEE

Taking one deposition	10.00

Praecipe for Transcript of Record.

To D. H. Hart, Esq., Clerk of the above Court:

You are hereby requested to make a transcript of record in this case, under the rules of this court, to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above

entitled cause, and to include in such transcript of record the following pleadings, proceedings and documents, to-wit:

1. Index.
2. Caption.
3. Plaintiff's First Amended Bill of Complaint.
4. Motion of S. O. Pottorff to dismiss Plaintiff's Amended Bill of Complaint, filed May 25, 1932.
5. Cross-bill of S. O. Pottorff, Receiver, filed April 5, 1932.
6. Answer of S. O. Pottorff to Plaintiff's Amended Bill of Complaint, filed May 25, 1932.
7. Motion of plaintiff to dismiss cross-bill of S. O. Pottorff, filed May 18, 1932.
8. Court's oral findings.
9. Judgment.
10. Findings of fact and conclusions of law.
11. Plaintiff's objections and exceptions to conclusions of law.
12. Order overruling plaintiff's objections to conclusions of law, with plaintiff's exceptions to action of the court in overruling same,
13. Statement of evidence and bill of exceptions.
14. Stipulation with reference to defendant holding liberty bonds involved, or proceeds of sale thereof, pending appeal and subject to final judgment.
15. Petition for appeal and for fixing amount of security to perfect appeal.
16. Assignments of error.
17. Order allowing appeal and fixing amount of security to perfect.
18. Supersedeas bond, with court's approval.
19. Cost bill, including cost for preparing transcript of record.
20. This praecipe for transcript of record.

21. Clerk's certificate.

S. N. RUSSELL
D. W. HARRINGTON
M. E. CLINTON
Attorneys for The Texas and Pacific Railway Company.

Due and legal service of the foregoing praecipe is hereby acknowledged, and it is agreed that the foregoing shall constitute the transcript of record.

Executed this 23rd day of August, A. D. 1932.

JONES, GOLDSTEIN, HARDIE & GRAMBLING,
By T. HARDIE,
Attorneys for S. O. Pottorff, Receiver.

Filed, U. S. District Court, Western District of Texas, Aug. 23, 1932, D. H. Hart, Clerk, By J. N. Phillips, Deputy Clerk.

Clerk's Certificate.

I, D. H. Hart, Clerk of the United States District Court for the Western District of Texas, hereby certify that the foregoing, on 117 pages, is a true and correct transcript of the proceedings had and the orders entered in cause No. 251 in Equity, styled The Texas and Pacific Railway Company vs. S. O. Pottorff, Receiver of The First National Bank of El Paso, Texas, as the same appear on file and of record in this office.

And I do further certify that the foregoing transcript embraces only such instruments and orders as are specified in the praecipe filed by the appellant and agreed to by the appellee.

Witness my official signature and the seal of said court hereto affixed at office in the City of El Paso, Texas, this 8th day of September, A. D. 1932.

D. H. HART, *Clerk,*

(SEAL) By.....*Deputy Clerk.*

J. N. PHILLIPS.

Minute entry of submission, November 9, 1933, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6748

THE TEXAS & PACIFIC RAILWAY COMPANY, Appellant,

versus

S. O. POTTORFF, Receiver of the First National Bank of El Paso, Texas, Appellee

Appeal from the District Court of the United States for the Western District of Texas

(January 19, 1933)

Before Bryan, Foster and Hutcheson, Circuit Judges

OPINION OF THE COURT—Filed January 19, 1933

HUTCHESON, Circuit Judge:

This case, and the case just decided, Pottorff, Receiver, v. El Paso-Hudspeth Counties Road District of Texas, — Fed. (2) —, involving the validity and the enforceability against the receiver of a contract of the bank pledging some of its assets to secure a depositor, in the one case of private, in the other of public funds, are companion cases. They were tried in the same court at the same time.

Appellee urged in the court below, and urges here, in each of the cases, that the agreement under which the securities were pledged is invalid and unenforceable as beyond the power of the bank and in contravention of public policy. The District Judge disagreeing with the receiver in the Road District case, agreed with him in this one. Following B. & O. v. Smith, 56 Fed. (2) 799, he thought that the authority which he had held under applicable statutes the bank had to secure deposits of public did not exist in the absence of statute to secure deposits of private funds; that the agreement was beyond the power

of the bank to make and void, and that plaintiff could not enforce it.

The facts in this case, as in the other, are undisputed. At the time the bank failed, appellant had on deposit $54,646.94. The receiver has approved its claim for that sum and has tendered a dividend on account of it of $16,394.08. He has refused to surrender the Liberty Bonds put up to secure the deposit. These are the circumstances of their pledging.

In July, 1922, the railway being then in receivership, the First National Bank of El Paso was designated as an additional depository upon condition that it should furnish bonds with good, solvent sureties. Thereafter the deposits first of the receiver, later of the company, were fully protected and their repayment guaranteed by corporate surety bonds. On January 29, 1931, the bank being still a solvent, going concern, the railway was induced by the bank to permit it to substitute for the surety bonds theretofore securing the deposit the Liberty Loan bonds in question. They were deposited with the trust officer of the bank to be held as security for the repayment, upon demand, of the deposits. By the agreement the bank saved bond premiums and secured the continuance of the deposit account, carrying an average balance of $50,000 which, but for its being secured either by bonds or pledge would have been withdrawn.

The record shows that though the bank had over a long period of years with the acquiescence of the Banking Department, furnished corporate surety bonds to protect the deposits of numerous private depositors, this was the first instance of its pledging assets to secure private funds. Further, the record is not only devoid of affirmative proof that the thing the bank did here accords with national banking practices and customs, or is at all a necessary or desirable practice, but no single other instance of the practice having been indulged in has been presented, and it shows that with the same uniformity which has attended the recognition of the power of national banks to secure public deposits by pledge, the Comptroller has ruled that they may not do so in the case of private deposits.

The general questions of the power of banks, state and national, in the absence of statutory authority, to pledge their assets to secure deposits, and of the enforceability of

such pledges when made, are interesting ones and have been the subject of many decisions. Raised usually in cases involving pledges to secure public deposits, and usually with reference to state banks, the questions have been differently decided in different jurisdictions, under the influence of different statutes and different views of the public policy involved. None of the cases, except arguendo, as in B. &, O. v. Smith supra, also 48 Fed. (2) 861; Schumacher vs. Eastern, 52 Fed. (2) 925; Sneedon v. City of Marion, 58 Fed. (2) 341, have drawn any distinction between private and public deposits as such, as to the power to secure them; but the question of power or not, where it had not been expressly conferred, has been decided broadly under the influence of the view taken by the particular court in the light of the existence or non-existence of statutes as to whether it accorded with public policy to imply the power. In jurisdictions where the courts have held that to permit one depositor to thus gain a preference over another, is contrary to sound public policy, they have stricken down pledges without regard to whether the funds secured were public or private, while in one or two jurisdictions where no contravention of public policy in thus pledging assets is seen, the courts have without distinction between them, sustained pledges of private and public deposits.[1]

In most of the cases this controversy has arisen where though there was statutory authority for pledging assets of a designated kind to secure public deposits, the statute did not expressly authorize the particular pledging. In those cases the question argued has been whether statutes authorizing pledging must, as contrary to a broad public policy, be construed strictly as enabling only in the very terms, or liberally, as effective analogically; whether they must be regarded as declaring a narrow or a broad public policy in regard to the pledging of assets to secure public deposits. An examination of these cases will show at once how great an influence on the decisions has been exerted by the varying views of public policy entertained by the

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[1] NOTE 1. Able v. Rhoads, 84 Pa. 319; Ward v. Johnson, 95 Ill. 215 cited in the text of Morse on Banks & Banking, 6 Ed., Vol. 1, sec. 63, p. 182, as holding that banks may secure persons who loan it money by deposits.

courts, and how uncertain, wavering and unreliable a guide, unless fixed by statute, this same public policy is. Twin City Pipe Line v. Harding, 283 U. S. 363; Ireland v. Craggs, 56 Fed. (2) 785. It will disclose that what is heresy in one jurisdiction, is doctrine in another, and even sometimes that what is heresy in one court in the same jurisdiction is doctrine in another court there.[2] It will show that most of the reasoning of the courts is that kind of rationalization where logic serves desire by bringing forth conclusions which the premises were assumed to secure. It will completely explain the apparent contradictions in the holdings. Cases taking the view that public policy requires statutes authorizing the giving of security for deposits to be strictly construed, and that the statutes in their precise terms are the measures of the banks' powers, are Commercial Bank & Tr. Co. v. Citizens Bank & Guaranty Co. (Ky.), 45 L. R. A. (N. S.) 950; Foster v. City of Longview (Tex.), 26 S. W. (2) 1059; Austin v. Lamar Co. (Tex.), 26 S. W. 1062; Farmers & Merchants v. Con. School Dist. (Minn.), 290 N. W. 163; Bliss v. Pathfinder (Neb.), 240 N. W. 291 (but see Bliss v. Marion, 237 N. W. 682); Shorneck v. Butler, 172 N. E. 181. Cases, and these are supported, we think, by the better reasons, holding that where the Legislature of a state has declared in specific statutes that deposits of public money must be secured this sufficiently indicates the public policy of the state toward the securing of public deposits, to sustain contracts whether in exact accordance with the statute or not, made in good faith for their security are, Am. Bank & Trust Co. v. Palm Beach (Fla.), 117 So. 900; 67 A. L. R. 1400; McLane v. Hunker, 299 Pac. 1075; Cameron v. Christy, 133 Atl. 551; McPherson v. Nat. Surety Co., 212 Pac. 489, c/f Michie Banks & Banking, Vol. 4, p. 22, sec. 19.

A few of the cases have put their decision against the power firmly on the ground that no express power to pledge assets to secure deposits having been granted to a bank, no basis in the absence of a statute authorizing or requiring the giving of security exists for the implication of the power. Those cases which have sustained the power

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[2] NOTE 2. Foster v. Longview, 11 S. W. (2) 217; 26 S. W. (2) 1059; Austin v. Lamar Co., 11 S. W. (2) 553; 26 S. W. 1062.

of a bank to pledge, by implying it, find support for that holding in the view that a deposit is a loan and claim to find in the established law that a bank has implied power to borrow money and pledge its assets authority to take deposits for such a pledge. Those denying the implication of the power do so on the ground that though a deposit does make the bank a debtor to the depositor, it is not a loan. They insist that the power must be sought elsewhere than in the implied power to make loans.

Few cases have arisen in the state courts, and only one in the national courts, B. & O. v. Smith, supra, has been called to our attention where the pledge has been made to a private depositor. These cases, except the two referred to in the preceding Note One have held against the power. None of them have pitched the holding on the private character of the deposit. In some the existence of a statute containing a general prohibition against the giving of security has compelled the decision, Porter v. Canyon Co. Fire Ins. Co., 263 Pac. 632. In some, as in Carter v. Brock (La.), 110 So. 71, though the court has declared against the power this has been dicta, for the actual holding was that the transaction was valid as not a deposit but a loan. McCown v. Edwards (Ark.), 48 S. W. 558, is a clear case distinguishing a deposit from a loan, and upon that distinction holding invalid the pledge of assets to secure a private deposit. In that case a guardian authorized to loan the money of his ward put it on general deposit upon the security of a pledge. In a suit to charge him upon failure of the bank he was held liable, the court saying "There is a vital distinction between a loan to a bank and a deposit with a bank. In one case security may be and usually is exacted; in the other, security may not be given by the bank. The power of the bank to borrow money and give security for it is unquestioned, while the power of the bank to give security for an ordinary deposit has been expressly denied."

We agree with this view that a deposit does indeed create a debt, but it creates something more. That a deposit is one thing, a loan another. "The striking fact is that a real difference between a deposit and a loan has always been assumed as a matter of custom in the banking business itself, and in Legislatures dealing with the subject." Divide Co. v. Baird, 212 N. W. 236.

We therefore reject the view that implied authority to pledge assets as security for loans extends to pledging them to secure deposits. We agree also with the view expressed, that generally speaking a bank's general powers do not authorize it to pledge assets for deposits. Michie, supra. We find specifically that this bank had no such power, and this not because the recognition of the power would conflict with our views of public policy, but because no express power to do so has been conferred upon it by statute, and because not only does the record not support the finding necessary to be made if the power is implied, that the giving of pledges for private deposits is a reasonable incident to the business of receiving deposits, and necessary to the proper conduct of the business of a national bank, but the judicial knowledge of banking practices and customs which we may take establishes the contrary to be true.

It remains only to inquire whether, though the contract is ultra vires, the railway can enforce its claim on the pledged bonds on the ground that though the agreement was beyond its powers, the bank has, by making it, obtained the deposit and therefore may not keep the bonds without returning the deposit made on the faith of their pledging.

Appellant argues that having complied with its part of the agreement by leaving its funds on general deposit with the bank, the bank ought to be made to do what it promised, that is, devote the securities to making appellant whole. It argues (1) that though the bank's agreement be ultra vires, estoppel prevents it saying so. (2) That the contract for depositing was a single one, the agreement for deposit being precedently conditioned on the agreement for security, and that agreement failing, the bank holds the funds not as debtor for a general depositor, but as trustee for a special one.

We cannot agree with either of these contentions. It is perfectly clear that though the Railway Company was induced by the promise of security to deposit its funds, there are two agreements here, not one. One, that the bank should pay back to the railway upon demand the sums deposited with it as other general deposits were. This entirely valid contract the receiver has recognized, and has offered to pay the Railway a dividend on account of it. The other is an agreement for security. This we have found to be in-

valid and without contractual force as beyond the corporate powers. This agreement plaintiff asks the aid of this Court to enforce.

It is settled law in the courts of the United States that what a corporation cannot bind itself to do, the courts will not compel. California Nat. Bank v. Kennedy, 167 U. S. 362; Union Pac. Ry. v. Chicago, 163 U. S. 564; Central Transportation Co. v. Pullman Car Co., 139 U. S. 60. Especially will it not do it in a case of this kind, where the controversy is not between the bank and the railway, but between the railway and the bank's creditors, the bank having failed, and "the interest of others than the parties," Beasley v. T. & P., 191 U. S. 492, being involved.

This is not a case like Aldrich v. Chemical Nat. Bank, 176 U. S. 636; Citizens Nat. Bank vs. Appleton, 216 U. S. 206; Schneider v. Thompson, 58 Fed. (2) 98, of a solvent bank which has obtained the benefit of a transaction, seeking to avoid, on the ground of ultra vires, returning what it has received. In those cases the suit was not on the contract, but on the benefits received. This is not such a case. It is upon a contract, to enforce it.

Appellant's claim that if it cannot have its contract, money of the bank, to the extent of its deposits, should be now earmarked and held in trust for it, is equally without merit. In the first place, while it is certainly true that parties may by agreement, give to deposits which would otherwise be general, the special character of trust funds, an agreement definitely fixing the character of the deposit as general may not be disregarded because, if the depositor had fully known the law and the facts, he would have acted differently for his protection. Fagan v. Whiddon, 57 Fed. (2) 631.

Appellant's contract with the bank for the repayment of its deposits on demand was valid. These deposits it can have back, if the bank can pay. The contract for security was indeed invalid, but there is no basis at all here for declaring a trust. Here is a contract for depositing, which was valid, and one for security which was invalid because of want of power in the bank, of which want of power appellant was as fully charged with knowledge as the bank was. The result is simply that though the railway has the right to press its claim for its debt, it cannot do so for the security.

It cannot be that a general depositor in a bank, who has made an agreement for security, may, because the security fails through an invalidity, which in law it knew, find the bank converted into a trustee and himself a cestui que trust of the money of the bank to the extent of the amount of his general deposit.

The judgment is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 6748

THE TEXAS & PACIFIC RAILWAY COMPANY,

versus

S. O. POTTORFF, Receiver of the First National Bank of El Paso, Texas

JUDGMENT—January 19, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was submitted to the Court upon the record and briefs on file;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, The Texas & Pacific Railway Company, and the sureties on the appeal bond herein, R. W. McAfee and C. N. Bassett, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR REHEARING—
February 9, 1933

On this the 9 day of February, 1933, came on to be heard the motion of appellant, The Texas & Pacific Railway Company, for an additional thirty days in which to prepare, file and present its petition for rehearing in the above styled cause, and it appearing to the Court that said motion should in all things be granted,

It is therefore ordered that appellant be and it hereby is granted twenty days in addition to the twenty-one days allowed by the rules of this Court in which to prepare, file and present its petition for rehearing in this cause.

(Signed) J. C. Hutcheson, Jr., U. S. Circuit Judge.

No. 6748

UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH CIRCUIT

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Appellant,

v.

S. O. POTTORFF, RECEIVER OF THE FIRST NATIONAL BANK OF EL PASO, TEXAS,

Appellee.

Appeal From the United States District Court for the Western District of Texas, El Paso Division

APPELLANT'S PETITION FOR REHEARING

To the Honorable United States Circuit Court of Appeals for the Fifth Circuit:

Comes now the Texas and Pacific Railway Company, appellant in the above entitled and numbered cause, and respectfully moves and prays the Court to grant it a rehearing in this cause and for grounds of this petition would show:

I

The Court erred in overruling and in not sustaining appellant's first specification of error and its point one thereunder reading as follows:

> "The trial court erred in concluding and in holding as a matter of law that the bank's pledge of liberty bonds to secure the railway company's deposit was wholly void and of no effect" (Brief, p. 18).
>
> "The First National Bank of El Paso acted within its lawful authority when it pledged its liberty bonds to secure the repayment of The Texas and Pacific Railway Company's deposit" (Brief, p. 21).

II

The Court erred in its findings that the record is "devoid of affirmative proof that the thing the bank did here accords with national banking practices and customs, or is at all a necessary or desirable practice" and that "no single other instance of the practice having been indulged in has been presented" (Opinion, p. 3), because the record shows that the pledge agreement enabled the bank to save the premiums on two corporate surety bonds, to earn 4 1/4 per cent on the pledged liberty bonds, and to hold the railway company's deposit (Tr. 94); and appellant's brief, page 31, calls attention to at least one other instance in which a national bank has pledged its

assets to secure the deposit of a railway company. Baltimore & Ohio Railroad Company v. Smith, 56 Fed. (2d) 799.

III

The Court erred in its conclusion that the record does not "support the finding necessary to be made if the power is implied, that the giving of pledges for private deposits is a reasonable incident to the business of receiving deposits, and necessary to the proper conduct of the business of a national bank" (Opinion, p. 7), because the record shows that the pledge agreement enabled the bank to save the premiums on two corporate surety bonds, to earn 4 1/4 per cent interest on the pledged liberty bonds, and to hold the railway company's deposit (Tr. 94).

IV

The Court erred in its finding and conclusion that the record "shows that with the same uniformity which has attended the recognition of the power of national banks to secure public deposits by pledge, the Comptroller has ruled that they may not do so in the case of private deposits" (Opinions, p. 3), because such finding and conclusion finds no support in the record which shows that the comptroller of the currency never made any com-

plaint to the officers of the First National, although his bank examiners learned of the pledge agreement about August 8, 1931, nearly one month before the bank closed (Tr. 94-95).

V

The Court erred in holding that "the judicial knowledge of banking practices and customs which we may take establishes" that the giving of pledges for private deposits is not a reasonable incident to the business of receiving deposits and is not necessary to the proper conduct of the business of a national bank; and the Court further erred in basing its decision adverse to appellant in part upon such judicial knowledge (Opinion, p. 7), for the reasons assigned under the foregoing third ground of error.

VI

The Court erred in its holding that "a deposit is one thing, a loan another", and in rejecting "the view that implied authority to pledge assets as security for loans extends to pledging them to secure deposits" (Opinion, p. 7).

VII

The Court erred in holding that "generally speaking a bank's general powers do not authorize it to pledge as-

sets for deposits", that the contract for security "was invalid because of want of power in the bank", that "this bank had no such power * * * because no express power to do so has been conferred upon it by statute", and because the record does not "support the finding necessary to be made if the power is implied, that the giving of pledges for private deposits is a reasonable incident to the business of receiving deposits, and necessary to the proper conduct of the business of a national bank" (Opinion, pp. 7, 9), for the reasons assigned under the foregoing third ground of error.

VIII

The Court placed too heavy a burden of proof upon appellant and particularly erred in holding, in effect, that to sustain the bank's implied power to make the pledge agreement, appellant must affirmatively prove that such agreement was "necessary to the proper conduct of the business of a national bank" and "accords with national banking practices and customs" (Opinion, pp. 3, 7).

IX

The Court erred in holding that appellant "was as fully charged with knowledge as the bank was" of the latter's "want of power" to make the contract for security (Opinion, p. 9), such power being dependent in

part upon the needs of the bank or what might be useful or beneficial to it.

X

The Court erred in overruling and in not sustaining appellant's second specification of error and its point two thereunder reading as follows:

> "The trial court erred in concluding and in holding as a matter of law that the receiver is not estopped from asserting the invalidity of the pledge agreement without returning or tendering back to the railway company the full amount of its deposits". (Brief, p. 18).
>
> "The receiver is estopped to assert the invalidity of the pledge agreement, at least until he has paid or tendered to the railway company the full amount of its deposits" (Brief, p. 57).

XI

The Court erred in holding in effect that the receiver could disaffirm the pledge agreement, it having been made in good faith while the bank was solvent and having been executed by the railway company.

XII

The Court erred in its conclusion that "this is not a case" like that "of a solvent bank which has obtained the benefit of a transaction, seeking to avoid, on the

ground of *ultra vires*, returning what it has received" (Opinion, p. 9), because the pledge agreement was made in good faith while the bank was solvent, the railway company deposited its money on the strength of that agreement, and the receiver stands in the shoes of the bank.

XIII

The Court erred in holding in effect that the receiver, as a representative of the bank's creditors, has rights or equities in and to the pledged liberty bonds different from and superior to those of the bank before the receivership (Opinion, p. 8), for the reasons assigned under the foregoing ground of error.

XIV

The Court erred in holding in effect that the case at bar is one "not between the bank and the railway, but between the railway and the bank's creditors" (Opinion, p. 8), for the reasons assigned under the foregoing twelfth ground of error.

XV

The Court erred in holding and in applying to this case its ruling that "It is settled law in the courts of the United States that what a corporation cannot bind itself to do, the courts will not compel (cases); Especially will it not do it in a case of this kind, where the controversy is not between the bank and the railway, but between the

railway and the bank's creditors, the bank having failed, and 'the interest of others than the parties' (case) being involved" (Opinion, p. 8), for the reasons assigned under the foregoing twelfth ground of error, and for the further reason that the facts of this case distinguish it from the citied cases announcing such rule of law.

XVI

The Court erred in overruling and in not sustaining appellant's third specification of error and its point three thereunder reading as follows:

> "The trial court erred in concluding and in holding as a matter of law that the railway company's deposits made subsequent to the pledge of the liberty bonds were general deposits the title to which passed to the bank, and were not special deposits the title to which remained and now is in The Texas and Pacific Railway Company" (Brief, p. 19).
>
> "If the pledge contract is wholly void and of no legal effect, the moneys deposited by the appellant on the faith of that agreement were accepted by the bank as special deposits, the title to which remained and now is in the railway company" (Brief, p. 65).

XVII

Having found that the pledge agreement was invalid, the Court erred in holding in effect that the agreement of deposit in this case definitely fixed the character of

the deposit as general (Opinion, p. 9), because appellant's deposits were made in reliance upon the validity of that agreement.

XVIII

The Court erred in holding that the contract of deposit contained two agreements, viz: "One that the bank should pay back to the railway upon demand the sums deposited with it as other general deposits were. * * * The other is an agreement for security" (Opinion, p. 8), because appellant's deposits were made in reliance upon the validity of that agreement.

XIX

The Court erred in holding "there is no basis at all here for declaring a trust", and in further holding, in effect, that the railway company, being a "general depositor" in the bank, cannot, because its security failed through an invalidity which in law it knew, have the bank converted into a trustee and itself into a *cestui que* trust of the money of the bank to the extent of the amount of its general deposit (Opinion, pp. 9-10), because, if its security was invalid the railway company never became a general depositor and the bank received and held its moneys as special deposits.

XX

The Court erred in overruling and in not sustaining appellant's fourth specification of error and its point four thereunder reading as follows:

> "The trial court erred in concluding and in holding as a matter of law that the railway company is not entitled to recover of and from the bank's receiver a sum equal to the full amount of its deposits, plus interest, as for money had and received" (Brief, p. 19).
>
> "If the pledge contract is wholly void and of no legal effect, the railway company is entitled to recover of and from the receiver a sum equal to the full amount of appellant's deposits, plus interest, as for money had and received" (Brief, p. 69).

XXI

The Court erred in disregarding appellant's alternative plea for money had and received (Tr. 10, Br. 69-73) and in holding that this is not a suit "on the benefits received" but is a suit "upon a contract, to enforce it" (Opinion, p. 9).

XXII

The Court's decision is in conflict with and is contrary to principles and rules of law announced by the Supreme Court in its decisions, among others:

Aldrich v. Chemical National Bank, 176 U. S. 618, 44 L. ed. 611;

Auten v. United States National Bank, 174 U. S. 125, 43 L. ed. 920;

Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. ed. 55;

Citizens National Bank v. Appleton, 216 U. S. 196, 54 L. ed. 443;

Eastern Building and Loan Association v. Williamson, 189 U. S. 122, 47 L. ed. 735;

First National Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122, 23 L. ed. 679;

Head v. The University, 86 U. S. 526, 22 L. ed. 160;

Jacksonville, etc., Railway Co. v. Hooper, 160 U. S. 514, 40 L. ed. 515;

Logan County National Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107;

Marine Bank v. Fulton County Bank, 69 U. S. 252, 17 L. ed. 785;

McCullough v. Maryland, 4 Wheaton 216, 4 L. ed. 579;

National Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188;

National Bank v. Whitney, 103 U. S. 99, 26 L. ed. 443;

New York County National Bank v. Massey, 192 U. S. 138, 48 L. ed. 380;

Rankin, Receiver v. Emigh, 218 U. S. 27, 54 L. ed. 915;

Robinson v. Lundrigan, 227 U. S. 173, 57 L. ed. 468;

Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059;

Thompson v. St. Nicholas National Bank, 146 U. S. 240, 36 L. ed. 957.

Union Pacific Ry. Co. v. Chicago, etc. Ry. Co., 163 U. S. 564, 41 L. ed. 265;

Wyman v. Wallace, 201 U. S. 230, 50 L. ed. 738.

Appellant has refrained from incorporating any argument in this petition in compliance with the Court's rule XXIX, but respectfully asks leave to file a written argument in support of this petition for rehearing.

Wherefore, premises considered, appellant prays the Court upon a consideration of this petition to set aside its judgment heretofore entered herein, to reverse the decree rendered by the court below, and to remand this

case to that court with instructions to grant the relief for which appellant prays in its amended bill of complaint, and for such other orders and decrees as to this Honorable Court appellant may seem entitled in the premises.

Dated February 28, 1933.

Respectfully submitted,

S. N. RUSSELL,
First National Bank Bldg.,
El Paso, Texas.

DEL W. HARRINGTON,
Bassett Tower,
El Paso, Texas.

T. D. GRESHAM,

M. E. CLINTON,
Texas and Pacific Bldg.,
Dallas, Texas.
Attorneys for Appellant,
The Texas and Pacific Railway Company.

Certificate of Counsel

I, the undersigned, of counsel for appellant, The Texas and Pacific Railway Company, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

(Signed) M. E. CLINTON,
Of Counsel for Appellant.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—March 8, 1933

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION FOR ORDER STAYING MANDATE—Filed March 18, 1933

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Comes now The Texas and Pacific Railway Company, appellant, and moves and prays the Court to enter an order herein withholding the mandate and staying the execution and enforcement of its judgment or decree rendered in this cause to enable appellant to perfect an appeal to or apply for and obtain a writ of certiorari from the Supreme Court of the United States, and for grounds of this motion appellant respectfully shows:

I

The Circuit Court of Civil Appeals on January 19, 1933, affirmed the judgment of the trial court in favor of appellee, and this Court on the 8th day of March, 1933, overruled appellant's petition for a rehearing.

II

Appellant will perfect an appeal to or apply for a writ of certiorari from the Supreme Court of the United States within the time allowed by law.

III

The stay order for which appellant prays, if granted, will not subject appellee to any damage because the pledged

liberty bonds are in appellee's possession and by agreement of the parties may be reduced to cash at the option of appellee. And appellant is ready and willing to post such bond as the Court may require under section 350 of title 28 of the United States Code.

Wherefore, appellant prays the Court to grant this application and to enter its order herein withholding the mandate and staying the execution and enforcement of its judgment or decree for a reasonable time to enable appellant to perfect an appeal to or apply for and obtain a writ of certiorari from the Supreme Court of the United States.

Respectfully submitted.

(Signed) S. N. Russell, Del W. Harrington, T. D. Gresham, M. E. Clinton, Attorneys for Appellant.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

STAY ORDER—Filed March 18, 1933

Upon application of The Texas and Pacific Railway Company, appellant in the above entitled cause, by its counsel, for an order withholding the mandate and staying the execution and enforcement of the judgment or decree of the United States Circuit Court of Appeals for the Fifth Circuit to enable appellant to perfect an appeal to or apply for and obtain a writ of certiorari from the Supreme Court of the United States, and good cause therefor being shown,

It is ordered that the mandate in this cause be and the same hereby is stayed and that the execution and enforcement of said judgment or decree be and it hereby is stayed until appellant, within the time allowed by law, perfects an appeal to the Supreme Court of the United States or applies for a writ of certiorari from that Court, and until the Supreme Court passes upon such application; provided, however, that The Texas and Pacific Railway Company, appellant, give good and sufficient surety, in the sum of One Thousand Dollars, to be approved by a judge of this Court, conditioned that if The Texas and Pacific Railway Company fails to perfect an appeal to or apply for a writ

of certiorari from the Supreme Court of the United States within the time allowed by law, or fails to obtain an order granting its application for any writ of certiorari which it may file, or fails to make its plea good in the Supreme Court, it shall answer for all damages and costs which appellee may sustain by reason of said stay.

Dated this the 17th day of March, 1933.

(Signed) J. C. Hutcheson, Jr., Judge of the United States Circuit Court of Appeals for the Fifth Circuit.

Bond on stay for $1,000.00, approved and filed March 18, 1933, omitted in printing.

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,731. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 128. The Texas & Pacific Railway Company, petitioner, vs. S. O. Pottorff, receiver of the First National Bank of El Paso, Texas. Petition for a writ of certiorari and exhibit thereto. Filed June 6, 1933. File No. 128, O. T., 1933.